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ABSTRACT

This casebook contains excerpts of 86 legal decisions handed down by appellate courts during 1985-95. The book was developed to inform school administrators about recent legal decisions in educational matters. In the area of general administration, cases cover issues of central governance, attendance, church/state relationship, curriculum, and desegregation. Cases pertaining to pupils include the topics of general student rights, drugs, free speech, rights of handicapped students, and search and seizure. Litigation pertaining to employed personnel deal with general personnel matters, discrimination, teacher dismissal, and teachers' due process rights. Liability cases comprise the final section. The bulk of the text is comprised of the excerpted court decisions. A list of cases and concepts derived from each decision are included. (LMI)

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ED 392 113

RECENT LEGAL DECISIONS IN EDUCATION:
A CASEBOOK OF APPELLATE COURT DECISIONS - 1985-1995

by

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FOREWORD

This casebook of legal decisions handed down by appellate courts in the past decade has been primarily developed for the benefit of school administrators. Nothing is more difficult for the school principal than to keep up with recent legal decisions in education matters. A school administrator may try to remain current by reading newspaper reports of decisions, by studying the various legal newsletters available to school administrators, and by examining the actual decisions in the law library of the local courthouse. However, the life of a school principal is very busy and leaves very little time for scholarly study in this crucial field where important court decisions are being handed down almost weekly. These excerpted cases are edited from the primary sources, the actual court decisions themselves, to be a resource for school administrators who must make difficult decisions on a wide variety of educational topics.

This casebook contains 86 appellate court decisions; however, many more decisions in the field of education have been studied in preparing this document. Only those cases the author believes are important in the daily administration of a school have been included. Consequently, decisions about legal procedures and those interpreting a specific state's statutes and constitutions, important to practicing attorneys, have not been included in this casebook.

To provide the reader with an overview of the major concepts addressed and decided by these courts, a list of the cases and concepts derived from the decisions has been developed. Of course, a single statement can only provide a beginning for understanding the court's decision on the matter in question.

Each included case has been excerpted so a school administrator can read the actual words of the court. Some of these decisions are quite lengthy. For example, the Kiryas Joel decision is 24 pages long. It has been excerpted to four pages here. The actual citation is provided with each case, so the reader may read the entire document in the law library.

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Brazell v. Board of Education of Niskayuna Public Schools, 5 5 7 NYS 2d 645 (1990)

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Cason v. Cook, 810 F 2d 1988 (1987)

Chalk v. United States District Court Central District of California, 840 F 2d 701 (1988)

Cleveland Board of Education v. Loudermill Parma Board of Education v. Donnelly, 105 SCt 1487 (1985)

Cooper v. Eugene School District No. 4J, 723 P 2d 298 (1986)

Crump v. Board of Education of the Hickory Administrative School Unit, 392 SE 2d 579 (1990)

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Hazelwood School District v. Kuhlmeier, 108 SCt 562 (1988)

Honig v. Doe, 108 SCt 592 (1988)

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In Interest of Doe, 887 P 2d 645 (1994)

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Johnson v. Charles City Community Schools Board of Education, 368 NW 2d 74 (1985)

Johnson v. Dallas Independent School District, 38 F 3d 198 (1994)

Johnson v. Francis Howell R-3 Board of Education, 868 SW 2d 191 (1994)

Kiryas Joel Village School District v. Grumet, 114 SCt 2481 (1994)

Klein Independent School District v. Mattox, 830 F 2d 576 (1987)

Lachman v. Illinois State Board of Education, 852 F 2d 290 (1988)

Lamb's Chapel v. Center Moriches Union Free School District, 113 SCt 2141 (1993)

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Lopez v. Tulare Joint Union High School District Board, 40 Cal Rptr 2d 762 (1995)

Matter of Gregory M., 627 NE 2d 500 (1993)

Milkovich v. Lorain Journal Co., 110 SCt 2695 (1990)

Mirand v. City of New York, 637 NE 2d 263 (1994)

Missouri v. Jenkins, 110 SCt 1651 (1990)

Morgan v. Board of Education of Girard City School District, 630 NE 2d 71 (1993)

Morris v. Clarksville-Montgomery County Consolidated Board of Education, 867 SW 2d 324 (1993)

Mozert v. Hawkins County Board of Education, 827 F 2d 1058 (1987)

Murphy v. State of Arkansas, 852 F 2d 1039 (1988)

Nassau County, Florida v. Arline, 107 SCt 1123 (1987)

New Jersey v. T.L.O., 105 SCt 733 (1985)

Oklahoma City Public Schools, Independent School District No. 89 v. Dowell, 111 SCt 630 (1991)

Peloza v. Capistrano Unified School District, 37 F 3d 517 (1994)

Pilditch v. Board of Education of City of Chicago, 3 F 3d 1113 (1993)

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Smith v. Dorsey, 530 S 2d 5 (1988)

Spring Branch Independent School District v. Stamos, 695 SW 2d 556 (1985)

Strong v. Board of Education of Uniondale Union Free School District, 902 F 2d 208 (1990)

Thomas v. Atascadero Unified School District, 662 F Supp 376 (1987)

Timothy W. v. Rochester, New Hampshire School District, 875 F 2d 954 (1989)

Trautvetter v. Quick, 916 F 2d 1140 (1990)

Vernonia School District 47J v. Acton, 63 U.S.L.W. 4653 (1995)

Virgil v. School Board of Columbia County, Florida, 862 F 2d 1517 (1989)

Wagenblast v. Odessa School District No. 105-157-166J, 758 P 2d 968 (1988)

Wallace v. Jaffree, 105 SCt 2479 (1985)

Washington v. Slattery, 787 P 2d 932 (1990)

Westside Community Schools v. Mergens, 110 SCt 2356 (1990)

Wilcher v. State of Texas, 876 SW 2d 466 (1994)

Wygant v. Jackson Board of Education, 106 SCt 1842 (1986)

Youngman v. Doerhoff, 890 SW 2d 330 (1994)

CASES AND CONCEPTS INCLUDED IN THIS CASEBOOK

GENERAL ADMINISTRATION

GENERAL GOVERNANCE

Aldridge v. School District of North Platte, 407 NW 2d 495 (1987)
Supreme Court of Nebraska
A charge that the school board made a decision prior to meeting must be supported by facts.

Alfonso v. Fernandez, 606 NYS 2d 259 (1993)
Supreme Court of New York, Appellate Division
School condom distribution, without prior parent consent, violates parents' substantive due process rights to raise their children.

Butcher v. Gilmer County Board of Education, 429 SE 2d 903 (1993)
Supreme Court of Appeals of West Virginia
A school board has the discretion to select a teacher with greater teaching experience, rather than a teacher with higher degrees.

Fremont RE-1 School District v. Jacobs, 737 P 2d 816 (1987)
Supreme Court of Colorado
The dismissal of a school bus driver may be an administrative matter delegable to the director of business services.

Hovet v. Hebron Public School District, 419 NW 2d 189 (1988)
Supreme Court of North Dakota
A state's open records law may make a teacher's personnel file subject to a citizen's inspection.

Jersey Shore Area School District v. Jersey Shore Education Association, 548 A 2d 1202 (1988)
Supreme Court of Pennsylvania
A school strike may create a danger to health, safety, or welfare of the public.

Kiryas Joel Village School District v. Grumet, 62 U.S.L.W. 4665 (1994)
Supreme Court of the United States
The State may not delegate its school authority to a religious group.

Lamb's Chapel v. Center Moriches Union Free School District, 113 SCt 2141 (1993)
Supreme Court of the United States
Based upon freedom of speech, a local board may not deny use of a school building to a religious group when it has

a policy allowing community groups to use school facilities.

Lloyd v. Grella, 634 NE 2d 171 (1994)
Court of Appeals of New York
A school board has the discretionary power to ban from schools military recruiters who discriminate on the basis of sexual orientation.

Smith v. Dorsey, 530 S 2d 5 (1988)
Supreme Court of Mississippi
A school board member had an indirect interest in a spouse's teaching contract

Spring Branch Independent School District v. Stamos, 695 SW 2d 556 (1985)
Supreme Court of Texas
The State has the power to set academic requirements for participation in extracurricular activities.

Strong v. Board of Education of Uniondale Union Free School District, 902 F 2d 208 (1990)
United States Court of Appeals, Second Circuit
A local board of education has the power to require a physical examination of a teacher returning from medical leave.

ATTENDANCE

Johnson v. Charles City Community Schools Board of Education, 368 NW 2d 74 (1985)
Supreme Court of Iowa
The compulsory attendance exception granted the Amish does not extend to a Baptist school.

Murphy v. State of Arkansas, 852 F 2d 1039 (1988)
United States Court of Appeals, Eighth Circuit
Achievement tests may be used by schools to monitor home instruction.

CHURCH/STATE

Aguilar v. Felton, 105 SCt 3232 (1985)
Supreme Court of the United States
Public funds for salaries of public school teachers, teaching educationally deprived children in religious schools, violates the Establishment Clause.

Gearon v. Loudoun County School Board, 844 F Supp 1097 (1993)
United State District Court, E.D. Virginia
The Establishment Clause is inherently violated when prayer is offered at high school graduation regardless of who decides the prayer will be given and who authorizes the actual wording.

Grand Rapids v. Ball, 105 SCt 3216 (1985)
Supreme Court of the United States
A shared time program for students attending a religious school where the instructors are paid by the State advances a religion and is unconstitutional.

Harris v. Joint School District No. 241, 41 F 3d 447 (1994)
United States Court of Appeals, Ninth Circuit
Student-led graduation prayer is district controlled and violates the Establishment Clause.

Lee v. Weisman, 112 SCt 2649 (1992)
Supreme Court of the United States
School-sponsored invocation and benediction at graduation ceremony is unconstitutional.

Peloza v. Capistrano Unified School District, 37 F 3d 517 (1994)
United States Court of Appeals, Ninth Circuit
A teacher has no Constitutional right to teach creationism or to discuss his religion with students.

Wallace v. Jaffree, 105 SCt 2479 (1985)
Supreme Court of the United States
A state-approved period of meditation or voluntary prayer in the public schools violates the Establishment Clause.

Westside Community Schools v. Mergens, 110 SCt 2356 (1990)
Supreme Court of the United States
Under the Equal Access Act, when a school creates an open forum by having non-curricular related clubs in school, it may not deny a student request to form a club based on the religious content of club meetings.

See also -
Kiryas Joel Village School District v. Grumet (non-delegability of State authority to religious group)

CURRICULUM

Edwards v. Aguillard, 107 SCt 2573 (1987)
Supreme Court of the United States
A State requirement of balanced treatment of creationism and evolution violates the First Amendment.

Mozert v. Hawkins County Board of Education, 827 F 2d 1058 (1987)
United States Court of Appeals, Sixth Circuit
A basic reading series is not unconstitutional because it conflicts with a student's religious beliefs.

Virgil v. School Board of Columbia County, Florida, 862 F 2d 1517 (1989)
United States Court of Appeals, Eleventh Circuit
The school board may remove works of Aristophanes and Chaucer from the school curriculum.

See also -
- Desilets v. Clearview Regional Board of Education (non-censorship of student film reviews)
- Fowler v. Board of Education of Lincoln County (teacher's use of violent and sexually suggestive film)
- Hazelwood School District v. Kuhlmeier (control of student newspaper)
- Lopez v. Tulare Joint Union High School District Board (censorship of profanity in student-made film)
- Murphy v. State of Arkansas (achievement tests to monitor home instruction)
- Peloza v. Capistrano Unified School District (teaching creationism and teacher's religion)
- Spring Branch Independent School District v. Stamos (academic standards for extracurricular activities)

DESEGREGATION

Freeman v. Pitts, 112 SCt 1430 (1992)
Supreme Court of the United States
Federal courts may incrementally relinquish supervision of aspects of desegregation plans when they feel major concerns have been met.

Jacobson v. Cincinnati Board of Education, 961 F 2d 100 (1992)
United States Court of Appeals, Sixth Circuit
A transfer plan for teachers may be based on race to achieve an integrated faculty.

Missouri v. Jenkins, 110 SCt 1651 (1990)
Supreme Court of the United States
Districts may be required by courts to levy property tax adequate to fund desegregation remedies.

Oklahoma City Public Schools, Independent School District No. 89, v. Dowell, 111 SCt 630 (1991)
Supreme Court of the United States
Federal courts' control of a de jure segregated school district is limited to time necessary to remedy discrimination.

PUPIL PERSONNEL

STUDENT RIGHTS - GENERAL

Garcia by Garcia v. Miera 817 F 2d 650 (1987)
United States Court of Appeals, Tenth Circuit
Grossly excessive punishment, shocking to the conscience, violates a student's substantive due process rights.

DRUGS

Morgan v. Board of Education of Girard City School District, 630 NE 2d 71 (1993)
Court of Appeals of Ohio, Trumbull County
A student may be expelled from school for selling marijuana in school.

Vernonia School District, 47J, v. Acton, 63 U.S.L.W., 4653 (1995)
Supreme Court of the United States
A school drug testing program may require a student athlete to take a drug test at the beginning of the season and to submit to random testing thereafter.

FREE SPEECH

Baxter v. Vigo County School Corporation, 26 F 3d 728 (1994)
United States Court of Appeals, Seventh Circuit
An elementary school student has no clearly established free speech rights.

Bethel School District No. 403 v. Fraser, 106 SCt 3159 (1986)
Supreme Court of the United States
Lewd and indecent speech by a student is not protected by the First Amendment.

Desilets v. Clearview Regional Board of Education, 647 A 2d 150 (1994)
Supreme Court of New Jersey
Censorship of a student's R-rated film reviews by school administrators without legitimate educational policy to govern school publications violates the student's First Amendment rights.

Good News/Good Sports Club v. School District of the City of Ladue, Missouri, 28 F 3d 1501 (1994)
United States Court of Appeals, Eighth Circuit
When a school establishes an open forum, it may not deny a student religious club access based on its religious perspectives because this practice is viewpoint discrimination in violation of free speech.

Hazelwood School District v. Kuhlmeier, 108 SCt 562 (1988)
Supreme Court of the United States
Removal of articles from the school newspaper by the principal is a curricular matter and does not violate constitutional provision for free speech.

Lopez v. Tulare Joint Union High School District Board, 40 Cal Rptr 2d 762 (1995)
Court of Appeal, Fifth District
School censorship of profanity in a student-made film does not violate student's free speech rights.

Settle v. Dickson County School Board, 53 F 3d 152 (1995)
United States Court of Appeals, Sixth Circuit
A teacher's authority to make assignments and give grades may place some limitations on a public school student's free speech rights.

See also -
Lamb's Chapel v. Center Moriches Union Free School District (use of school building by religious group)

RIGHTS OF HANDICAPPED STUDENTS

Honig v. Doe, 108 SCt 592 (1988)
Supreme Court of the United States
"Stay-put" requirement forbids school officials from unilaterally excluding a handicapped student from a classroom for dangerous conduct growing out of a disability during required review proceedings when normal procedures for dealing with dangerous students can be utilized.

Lachman v. Illinois State Board of Education, 852 F 2d 290 (1988)
United States Court of Appeals, Seventh Circuit
Educators may choose accepted, proven methodology, contrary to parents desires, in educating a handicapped child, when school officials comply with procedural requirements of EAHCA.

Thomas v. Atascadero Unified School District, 662 F Supp 376 (1987)
United States District Court, Central District of California
A student with AIDS is handicapped and protected by Section 504 of the Federal Rehabilitation Act.

Timothy W. v. Rochester, New Hampshire School District, 875 F 2d 954 (1989)
United States Court of Appeals, First Circuit
EAHCA does not require a child to demonstrate a benefit of an education, but the law mandates education for all

handicapped children.

SEARCH AND SEIZURE

Cason v. Cook, 810 F 2d 1988 (1987)
United States Court of Appeals, Eighth Circuit
A school official may assist a police officer in the search of a student.

Galford v. Mark Anthony B, 433 SE 2d 41 (1993)
Supreme Court of Appeals of West Virginia
A strip search of a student in search of a stolen $100 is excessively intrusive.

In Interest of Doe, 887 P 2d 645 (1994)
Supreme Court of Hawai'i
The reasonable suspicion standard applies in the lawful search of a student's purse.

In Interest of F.B., 658 A 2d 1378 (1995)
Superior Court of Pennsylvania
When a school, having no individualized suspicion of a student, uses metal detectors to search a student for weapons upon entering a high school, the student's Fourth Amendment rights against unreasonable search and seizure are not violated.

Matter of Gregory M., 627 NE 2d 500 (1993)
Court of Appeals of New York
When school officials have reasonable suspicion a student has a weapon in school evidenced by the shape of a gun in a book bag, a search of the student's property is justified.

New Jersey v. T.L.O., 105 SCt 733 (1985)
Supreme Court of the United States
A school official's search of a student is constitutional if the search is based on reasonable suspicion, is justified at its inception, and is reasonable in its scope.

Washington v. Slattery, 787 P 2d 932 (1990)
Court of Appeals of Washington
Search of a student's car and locked briefcase is constitutional.

Wilcher v. State of Texas, 876 SW 2d 466 (1994)
Court of Appeals of Texas, El Paso
When a school district police officer's "pat-down" of a student who was reported carrying a weapon in school is justified at its inception and reasonable in its scope,

it does not violate a student's rights.

EMPLOYED PERSONNEL

PERSONNEL MATTERS - GENERAL

Brandt v. Board of Co-op Education Services, 820 F 2d 41 (1987)
United States Court of Appeals, Second Circuit
A teacher has a right to a hearing concerning stigmatizing information in his personnel file.

Cooper v. Eugene School District No. 4J, 723 P 2d 298 (1986)
Supreme Court of Oregon
A teaching certificate may be revoked if the teacher wears religious garb in school contrary to a statutory prohibition against such.

Daury v. Smith, 842 F 2d 9 (1988)
United States Court of Appeals, First Circuit
The right of privacy is not violated if the principal is required by the school board to see a psychiatrist.

Feldhusen v. Beach Public School District No. 3, 423 NW 2d 155 (1988)
Supreme Court of North Dakota
Contract renewal may be dependent upon the teacher obtaining necessary credit hours during a specified period when this requirement is a part of the negotiated agreement.

Klein Independent School District v. Mattox, 830 F 2d 576 (1987)
United States Court of Appeals, Fifth Circuit
The public has a right to see a teacher's college transcript.

Milkovich v. Lorain Journal Company, 110 SCt 2695 (1990)
Supreme Court of the United States
A coach may recover damages where a newspaper falsely implies, without proof, the coach lied under oath.

Seemuller v. Fairfax County School Board, 878 F 2d 1578 (1989)
United States Court of Appeals, Fourth Circuit
The teacher's public letter on sexual discrimination addressed a public concern.

See also -
- Jacobson v. Cincinnati Board of Education (transfer plan for racial integration of faculty)
- Peloza v. Capistrano Unified School District (teaching creationism and teacher's religion)

DISCRIMINATION

Ansonia Board of Education v. Philbrook, 107 SCt 367 (1986)
Supreme Court of the United States
Title VII requires a school board to offer reasonable accommodation of a teacher's religion, not to show that each of the employee's alternatives might result in employer's undue hardship.

Chalk v. United States District Court Central District of California, 840 F 2d 701 (1988)
United States Court of Appeals, Ninth Circuit
A school district may not bar an "otherwise qualified" teacher with AIDS from teaching in the classroom.

Nassau County, Florida v. Arline, 107 SCt 1123 (1987)
Supreme Court of the United States
A tubercular teacher is "handicapped" under Section 504 of the Rehabilitation Act.

Pilditch v. Board of Education of City of Chicago, 3 F 3d 1113 (1993)
United States Court of Appeals, Seventh Circuit
Without proof of discrimination, a white principal can not prevail against black council members who vote for his termination as a principal.

Trautvetter v. Quick, 916 F 2d 1140 (1990)
United States Court of Appeals, Seventh Circuit
Consensual sex between a principal and a teacher is not sexual harassment and cannot support a charge of sexual discrimination.

Wygant v. Jackson Board of Education, 106 SCt 1842 (1986)
Supreme Court of the United States
Affirmative retention policy laying off senior nonminority teachers and retaining less senior African-American teachers violates equal protection.

TEACHER DISMISSAL

Fowler v. Board of Education of Lincoln County, Kentucky, 819 F 2d 657 (1987)
United States Court of Appeals, Sixth Circuit
Dismissal of a teacher for using an "R-rated," violent, sexually suggestive, film having no proper educational purpose is upheld.

Johnson v. Francis Howell R-3 Board of Education, 868 SW 2d 191 (1994)
Missouri Court of Appeals, Eastern District
A teacher may be dismissed for documented incompetence.

Morris v. Clarksville-Montgomery County Consolidated Board of Education, 867 SW 2d 324 (1993)
Court of Appeals of Tennessee, Middle Section
When a teacher sleeps with one of his male students on several occasions, that teacher commits unprofessional conduct, justifying dismissal as a teacher.

Youngman v. Doerhoff, 890 SW 2d 330 (1994)
Missouri Court of Appeals, Eastern District
When a male teacher hugs and kisses the neck of a distressed male student, it may be poor judgment, but it is not immoral conduct, worthy of the teacher's dismissal.

TEACHERS' DUE PROCESS RIGHTS

Brown v. South Carolina State Board of Education, 391 SE 2d 966 (1990)
Supreme Court of South Carolina
Procedural due process must be granted a teacher before a State may remove a teaching certificate.

Cleveland Board of Education v. Loudermill
Parma Board of Education v. Donnelly, 105 SCt 1487 (1985)
Supreme Court of the United States
A nontenured school employee who may be discharged for cause is due only a notice and the opportunity to respond.

Crump v. Board of Education of the Hickory Administrative School Unit, 392 SE 2d 579 (1990)
Supreme Court of North Carolina
A board member's bias at a hearing deprives a teacher of due process.

Roberts v. Houston Independent School District, 788 SW 2d 107 (1990)
Court of Appeals of Texas
Videotapes may be used in the evaluation procedures resulting in teacher dismissal.

See also -
Butcher v. Gilmer County Board of Education (school board selection of a teacher with greater experience rather than higher college degrees)

Hovet v. Hebron Public School District (citizen's inspection of teacher's personnel file)
Smith v. Dorsey (board member's spouse's contract)
Strong v. Board of Education of Uniondale Union Free School District (physical examination for returning teacher)

LIABILITY

Brazell v. Board of Education of Niskayuna Public Schools, 5 5 7 NYS 2d 645 (1990)
Supreme Court, Appellate Division
Student's intervening culpable act of stealing chemicals absolved the school board of liability.

Brown v. Tesack, 566 S 2d 955 (1990)
Supreme Court of Louisiana
Lack of reasonable care in disposing of duplicating fluid imposes liability on the school board.

Dugger v. Sprouse, 364 SE 2d 275 (1988)
Supreme Court of Georgia
A school system's insurance policy has an impact on whether sovereign immunity is waived.

Gates v. Unified School District No. 449, 996 F 2d 1035 (1993)
United States Court of Appeals, Tenth Circuit
A school district is not liable for a teacher's sexual assault of a student where no causal link to the board has been demonstrated.

Gonzales v. Ysleta Independent School District, 996 F 2d 745 (1993)
United States Court of Appeals, Fifth Circuit
The school district is not liable for a teacher's sexual molestation of a student where it was not shown the board had a policy of deliberate indifference to the student's constitutional rights.

Graham v. Independent School District No. I-89, 22 F 3d 991 (1994)
United States Court of Appeals, Tenth Circuit
A school district has no constitutional duty to protect students from injuries caused by third parties and, therefore, is not liable in such cases.

Hagan v. Houston Independent School District, 51 F 3d 48 (1995)
United States Court of Appeals, Fifth Circuit
Where there is no showing a principal could have foreseen that the coach would have sexual contact with his male athletes and no showing the principal was deliberately indifferent to complaining students' rights, there is no liability under section 1983.

Hammond v. Board of Education of Carroll County, 639 A 2d 223 (1994)
Court of Special Appeals of Maryland
A school board has no duty to warn a female student of obvious dangers of participation in varsity football.

Johnson v. Dallas Independent School District, 38 F 3d 198 (1994)
United States Court of Appeals, Fifth Circuit
A random criminal act of a non-student entering a high school and killing a student does not violate the student's constitutional rights nor create liability for the school district.

Lentz v. Morris, 372 SE 2d 608 (1988)
Supreme Court of Virginia
The court may extend sovereign immunity to protect a teacher from liability in student injury.

L.K. v. Reed, 631 So 2d 604 (1994)
Court of Appeal of Louisiana, Third Circuit
A student rape victim is entitled to damages from the perpetrator but not from the school.

Mirand v. City of New York, 637 NE 2d 263 (1994)
Court of Appeals of New York
A New York school district has a duty to supervise students at dismissal and is liable for foreseeable injuries caused by a student's assault.

Roe v. North Adams Community School Corporation, 647 N.E. 2d 655 (1995)
Court of Appeals of Indiana
The school district and teachers are not liable for a camcorder being hidden in the women's locker room by male students.

Wagenblast v. Odessa School District No. 105-157-166J, 758 P 2d 968 (1988)
Supreme Court of Washington
A local board of education does not have the power to require students or parents to sign releases from future liability claims for negligence as a condition for participation in interscholastic athletics.

EXCERPTED APPELLATE COURT DECISIONS

PUBLIC FUNDS FOR SALARIES OF PUBLIC SCHOOL TEACHERS, TEACHING EDUCATIONALLY DEPRIVED CHILDREN IN RELIGIOUS SCHOOLS, VIOLATES THE ESTABLISHMENT CLAUSE.

Aguilar v. Felton
105 SCt 3232 (1985)

Supreme Court of the United States

JUSTICE BRENNAN delivered the opinion of the Court.

The City of New York used federal funds to pay the salaries of public employees who teach in parochial schools. In this companion case to School District of Grand Rapids v. Ball, we determine whether this practice violates the Establishment Clause of the First Amendment.

The program at issue in this case, originally enacted as Title I of the Elementary and Secondary Education Act of 1965, authorizes the Secretary of Education to distribute financial assistance to local education institutions to meet the needs of educationally deprived children from low-income families. The funds are to be appropriated in accordance with programs proposed by local educational agencies and approved by state educational agencies. "To the extent consistent with the number of educationally deprived children in the school district who are enrolled in private elementary and secondary schools, such agency shall make provisions for including special education services and arrangements...in which such children can participate."...

Since 1966, the City of New York has provided instructional services funded by Title I to parochial school students on the premises of parochial schools. Of those students eligible to receive funds in 1981-1982, 13.2% were enrolled in private schools. Of that group, 84% were enrolled in schools affiliated with the Roman Catholic Archdiocese of New York and the Diocese of Brooklyn and 8% were enrolled in Hebrew day schools. With respect to the religious atmosphere of these schools, the Court of Appeals concluded that "the picture that emerges is of a system in which religious considerations play a key role in the selection of students and teachers, and which has as its substantial purpose the inculcation of religious values."

The program conducted at these schools include remedial reading, reading skills, remedial mathematics, English as a second language, and guidance services. These programs are carried out by regular employees of the public schools (teachers, guidance counselors, psychologists, psychiatrists and social workers) who have volunteered to teach in the parochial schools. The amount of time that each professional spends in the parochial school is determined by the number of students in the particular program and the needs of these students....The professionals involved in the program are directed to avoid involvement with religious activities that are conducted within the private schools and to bar religious materials in their classrooms. All material and equipment used in the programs funded under Title I are supplied by the Government and are used only in those programs. The professional personnel are solely responsible for the selection of the students. Additionally, the professionals are informed that contact with private school personnel should be kept to a minimum. Finally, the administrators of the parochial schools are required to clear the classrooms used by the public school personnel of all religious symbols....

...The New York programs challenged in this case are very similar to the programs we examined in Ball. In both cases, publicly funded instructors teach classes composed exclusively of private school students in private school buildings. In both bases, an overwhelming number of the participating private schools are religiously affiliated. In both cases, the publicly funded programs provide not only professional personnel, but also all materials and supplies necessary for the operation of the programs. Finally, the instructors in both cases are told that they are public school employees under the sole control of the public school system.

The appellants attempt to distinguish this case on the ground that the City of New York, unlike the Grand Rapids Public School District, has adopted a system for monitoring the religious content of publicly funded Title I classes in the religious schools. At best, the supervision in this case would assist in preventing the Title I program from being used, intentionally, or unwittingly, to inculcate the religious beliefs of the surrounding parochial school. But appellants' argument fails in any event, because the supervisory system established by the City of New York inevitably results in the excessive entanglement of church and state, an Establishment Clause concern distinct from that addressed by the effects doctrine. Even where state aid to parochial institutions does not have the primary effect of advancing religion, the provision of such aid may nonetheless violate the Establishment Clause owing to the nature of the interaction of church and state in the administration of that aid.

The principle that the state should not become too closely entangled with the church in the administration of assistance is rooted in two concerns. When the state becomes enmeshed with a given denomination in matters of religious significance, the freedom of religious belief of those who are not adherents of that denomination suffers, even when the governmental purpose underlying the involvement is largely secular. In addition, the freedom of even the adherents of the denomination is limited by the governmental intrusion into sacred matter. "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."...

The critical elements of the entanglement proscribed in Lemon and Meek are thus present in this case. First, as noted above, the aid is provided in a pervasively sectarian environment. Second, because assistance is provided in the form of teachers, ongoing inspection is required to ensure the absence of a religious message....In short, the scope and duration of New York's Title I program would require a permanent and pervasive State presence in the sectarian schools receiving aid.

This pervasive monitoring by public authorities in the sectarian schools infringes precisely those Establishment Clause values at the role of the prohibition of excessive entanglement. Agents of the State must visit and inspect the religious schools regularly, alert for the subtle or overt presence of religious matter in Title I classes....In addition, the religious school must obey these same agents when they make determinations as to what is and what is not a "religious symbol" and thus off limits in a Title I classroom. In short, the religious school, which has as a primary purpose the advancement and preservation of a particular religion must endure the ongoing presence of state personnel whose primary purpose is to monitor teachers and students in an attempt to guard against the infiltration of religious thought.

The administrative cooperation that is required to maintain the educational program at issue here entangles church and state in still another way that infringes interests at the heart of the Establishment Clause. Administrative personnel of the public and parochial school systems must work together in resolving matters related to schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding the program. Furthermore, the program necessitates "frequent contacts between the regular and the remedial teachers (or other professionals), in which each side reports on individual student needs, problems encountered, and results achieved."...

We have long recognized that underlying the Establishment Clause is "the objective...to prevent, as far as possible, the intrusion of either [Church or State] into the precincts of the other."...The numerous judgments that must be made by agents of the state concern matters that may be subtle and controversial, yet may be of deep religious significance to the controlling denominations. As government agents must make these judgments, the dangers of political divisiveness along religious lines increase. At the same time, "[t]he picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental 'secularization of a creed.'"...

Despite the well-intentioned efforts taken by the City of New York, the program remains constitutionally flawed owing to the nature of the aid, to the institution receiving the aid, and to the constitutional principles that they implicate--that neither the State nor Federal Government shall promote or hinder a particular faith or faith generally through the advancement of benefits or through the excessive entanglement of church and state in the administration of those benefits.

Affirmed.

A CHARGE THAT THE BOARD MADE ITS DECISION PRIOR TO MEETING MUST BE SUPPORTED BY FACTS.

Aldridge v. School District of North Platte
407 NW 2d 495 (1987)

Supreme Court of Nebraska

WHITE, Justice. Gary R. Aldridge appeals from an order of the district court for Lincoln County, Nebraska, granting summary judgment in favor of the appellees, the school district of North Platte and six members of its board of education....

The petition in this case attacked decisions made by the board in regard to the employment status of the superintendent of schools. On August 31, 1984, the superintendent was found guilty of third degree sexual assault. The board called a meeting on September 5, 1984, a week before the next scheduled meeting. The meeting was largely attended, and when the matter concerning the superintendent's conviction arose, board member Linda L. Gale requested that there be no discussion on the subject. Dallas F. Darland, a board member, announced that he had been tendered a resignation by the superintendent and read aloud the letter, which stated that the superintendent would resign voluntarily in December. Darland moved to accept the offer to resign; the motion was seconded and passed. Board member Myra Satterfield then made a motion to suspend the superintendent from his duties with pay until his resignation was effective. The motion also was seconded and passed. There was no discussion of these motions except for the reading of the letter and the making of the motions.

Aldridge's petition alleges two causes of action: first, that a quorum of the board met with the attorney for the school district and discussed and made policy in violation of the public meetings law; and second, that the motion by Satterfield to suspend the superintendent with pay passed without public discussion based on the prior nonpublic briefing and meeting alleged in the first count.

In his deposition Aldridge stated he based his allegations that the public meetings law was violated on two facts: that a major motion passed without discussion and that a witness saw a quorum (four of six) of the board members at the school board attorney;s office earlier in the day of the September 5 meeting. The witness, Kathy Seacrest, testified on deposition that she saw four board members in the "entryway" of the attorney's office and that two of them were leaving as she left. She heard no discussion or comments made by the members.

A reading of the depositions of the board members exposes no discrepancies in their stories. The four members met with the attorney to discuss the legal ramifications of various options to remove the superintendent from office. Each feared a long legal battle and was informed that the superintendent had due process and contractual rights in his employment. Each was aware that certain of the benefits would vest in December and that the superintendent know this. They specifically denied that a quorum ever met to decide policy and testified that they left the office having made no decision in the matter....

At oral argument counsel for Aldridge argued that Gale's statement limiting discussion on the issue was a violation of the public meetings law. The petition shows two causes of action: that an illegal meeting of a quorum of the board took place prior to the public meeting and that, without public discussion, the board passed a motion based on the previous illegal deliberations. The petition does not maintain that public discussion may not be limited or prohibited by the board at its meetings....

Appellant's counsel conceded at argument that the attorney for the board could advise members two at a time without violating the public meetings law. However, he still argues that the lack of discussion at the meeting implies that the real decision was made illegally prior to the meeting.

The appellant based his case on Seacrest's statements that she saw four board members in the attorney's office. She corroborated their statements that two were leaving as two were waiting. Obviously, no meeting of the board members in which a quorum was present occurred....

The appellees' testimony establishes that no improper meeting occurred. The appellant then had the burden to introduce evidence in opposition to the motion for summary judgement that would tend to prove that a meeting did occur....He could not produce such evidence. Since no issue of fact existed, the motion for summary judgment was properly granted in favor of the appellees.

Affirmed.

SCHOOL CONDOM DISTRIBUTION, WITHOUT PRIOR PARENTAL CONSENT, VIOLATES PARENTS' SUBSTANTIVE DUE PROCESS RIGHT TO RAISE THEIR CHILDREN.

Alfonso v. Fernandez
606 NYS 2d 259 (1993)

New York Supreme Court, Appellate Division

PIZZUTO, Justice.

Today, we hold that the respondents are prohibited from dispensing condoms to unemancipated minor students without the prior consent of their parents or guardians, or without an opt-out provision. Condom distribution in the public schools is a health service rather than health education and thus, in the absence of a provision requiring the prior consent of unemancipated minor students' parents or guardians, or in the absence of an opt-out provision, lacks common-law or statutory authority. In addition, the respondents' plan to dispense condoms to unemancipated minor children without the consent of their parents or guardians, or an opt-out provision violates the civil rights of the parent petitioners and similarly-situated parents or guardians under the substantive due process clauses of the Fourteenth Amendment of the United States Constitution and New York Constitution....

In September 1987 the New York State Commission of Education directed all elementary and secondary schools to include, as part of health education programs, instruction concerning Human Immunodeficiency Virus (HIV) which causes Acquired Immune Deficiency Syndrome (AIDS)....In later 1990, Joseph Fernandez, then Chancellor of the New York City Board of Education suggested enlarging the existing HIV/AIDS curriculum to impart additional education about the transmission and prevention of HIV/AIDS. The former Chancellor also suggested that condoms be made available to high school students upon request. On February 27, 1991, the New York City Board of Education voted to establish an expanded HIV/AIDS Education Program in New York City's public high schools, consisting of two components.

The first component calls for classroom instructions on various aspects of HIV/AIDS. Each public high school is required to adopt a curriculum which incorporates lessons on the various means by which one could be infected with HIV, and the methods of prevention. Abstinence from sexual activity is to be stressed. This component of the program is mandatory, but includes a parental opt-out provision whereby a parent may opt his or her minor unemancipated child out of the classroom instruction upon the assurance that the child will receive such instruction at home.

The second component of the program calls for the high schools to make condoms available to students who request them. Public high schools are to establish health resource rooms where trained professionals are to dispense condoms to students who request them. A student to whom condoms are dispensed must be given personal health guidance counselling involving the proper use of condoms, and the consequences of their use or misuse. Students are not required to participate in this component of the program and no sanction is imposed on a student who does not do so. Most importantly, this component of the respondents' program does not include a provision for parental consent or opt-out.

The petitioners, who are parents of the New York City public school students...contend that implementation of the condom availability component of the program: (a) violates Public Health Law section 2504, because it constitutes "health services" to unemancipated, minor children without the consent of their parents or guardians, and therefore is not authorized by law, (b) violates their due process right to direct the upbringing of their children, and (c) violates their rights to the free exercise of their religion as guaranteed by the First Amendment of the U.S. Constitution and N.Y. Constitution....

As common law it was for parents to consent or withhold their consent to the rendition of health services of their children....

The condom availability component of the respondents' program is not merely education, but is a health service to prevent disease by protecting against HIV infection. In the words of Dr. Robert A. Meyers, a former president of New York State Medical Society: "The purpose of [condom distribution] could only be prophylaxis, and there is no way that it could be considered a form of education"....

Supplying condoms to students upon request has absolutely nothing to do with education, but rather is a health service occurring after the educational phase has ceased. Although the program is not intended to promote promiscuity, it is intended to encourage and enable students to use condoms if and when they engage in sexual activity. This is clearly a health service for the prevention of disease which requires parental consent....

It cannot be disputed that "the State has a compelling interest in controlling AIDS, which presents a public health concern of the highest order. Nor can there be any doubt as to the blanket proposition that the State has a compelling interest in educating its youths about AIDS. Education regarding the means by which AIDS is communicated is a powerful weapon against the spread of the disease and clearly an essential component of our nationwide struggle to combat it"....

Requiring parental consent or opt-out for the condom availability component of the respondents' program would not violate State and Federal statutory and constitutional law....

...The distribution of condoms in our public high schools, where attendance is compulsory, even though condoms are nonmedicinal and require no prescription, is quite different from making them available at clinics, where attendance is wholly voluntary, or as part of public assistance programs. There is no specific authority for the condom availability component of the respondents' program, no matter how commendable its purpose may be.

...The primary purpose of the Board of Education is...education. No judicial or legislative authority directs or permits teachers and other public school educators to dispense condoms to minor, unemancipated students without the knowledge or consent of their parents. Nor do we believe that they have any inherent authority to do so.

...Because the Constitution gives parents the right to regulate their children's sexual behavior as best they can, not only must a compelling State interest be found supporting the need for the policy at issue, but that policy must be essential to serving that interest as well. We do not find that the policy is essential. No matter how laudable its purpose, by excluding parental involvement, the condom availability component of the program impermissibly trespasses on the petitioners' parental right by substituting the respondents in loco parents, without a compelling necessity therefore.

The petitioners enjoy a well-recognized liberty interest in rearing and educating their children in accord with their own views (U.S. Const., 14th Amend,; N.Y. Const., art I, section 6....) The minority points to the fact that student participation in the condom availability component of the expanded HIV/AIDS program is wholly voluntary, devoid of any penalty for nonparticipation, and that parents are still free to provide guidance on this and related (or unrelated) issues. However, these factors do not constitute proof that the petitioners are not being forced to surrender a parenting right--specifically, to influence and guide the sexual activity of their children without State interference.

...Students are not just exposed to talk or literature on the subject of sexual behavior, the school offers the means for students to engage in sexual activity at a lower risk of pregnancy and contracting sexually transmitted diseases....

...[T]he respondents, too, do not wish to encourage sexual activity among minors but only to slow the spread of AIDS. Nevertheless, in determining whether this program intrudes on parental rights in the first instance the issue is not one of purpose but one of effect. We must take great care not to be blinded by the concept that the end justifies the means. In accord with the foregoing, we conclude that the policy intrudes on the petitioners' rights be interfering with parental decision making in a particularly sensitive area. Through its public schools the City of New York has made a judgment that minors should have unrestricted access to contraceptives, a decision which is clearly within the purview of the petitioners' constitutionally protected right to rear their children, and then has forced that judgment on them.

Because we believe that the petitioner parents have demonstrated an intrusion on their constitutionally-protected right to rear their children as they see fit, we turn next to the issue: whether a compelling State interest is involved and whether this program is necessary to meet it. There is no question, as the Court of Appeals has stated, that "the State has a compelling interest in controlling AIDS....We must ask whether an interference in the petitioners' rights is necessary to meet this public health threat. Specifically, can it be said that absent the program challenged by the petitioners, sexually active students, educated by the schools to the danger of sexually transmitted diseases, will be unable to acquire condoms without difficulty?...It is hardly a secret that condoms are now displayed next to vitamins and cold remedies....

We conclude that the condom availability component of the respondents' program does not violate the petitioning parents' right to the free exercise of their religion....

The gist of the petitioners' claim is that they find the condom availability component of the program to be objectionable on religious grounds because it may tempt their children to stray from their religious beliefs. Such a contention does not state a viable claim based on the Free Exercise clause. "The central question in identifying an unconstitutional burden is whether the claimant has been denied the ability to practice his religion or coerced in the nature of those practices"....At bar, any student who fails or refused to participate is not visited with a sanction. Nor is this a case in which anyone who refuses to participate is held criminally liable....or denied a benefit....

The condom availability component of the respondents' program does not prohibit the petitioning parents and/or their children from practicing their religion. Nor does it directly or indirectly coerce them to engage in conduct or practices which are contrary to their religious beliefs. "Moreover, parents have no constitutional right to tailor public school programs to individual preferences, including religious preferences".... Merely because the petitioners find the program objectionable does not render it violative of their right to the free exercise of their religion....

In light of our determination that the condom availability component lacks common-law or statutory authority, and violates the petitioners' civil right to rear their children as they see fit, the order and judgment just be reversed....

TITLE VII REQUIRES A SCHOOL BOARD TO OFFER REASONABLE ACCOMMODATION OF A TEACHER'S RELIGION, NOT TO SHOW THAT EACH OF EMPLOYEE'S ALTERNATIVES WOULD RESULT IN EMPLOYER'S UNDUE HARDSHIP.

Ansonia Board of Education v. Philbrook
107 SCT 367 (1986)

Supreme Court of the United States

Chief Justice REHNQUIST delivered the opinion of the Court. Petitioner Ansonia Board of Education has employed respondent Ronald Philbrook since 1962 to teach high school business and typing classes in Ansonia, Connecticut. In 1968, Philbrook was baptized into the Worldwide Church of God. The tenets of the church require members to refrain from secular employment during designated holy days, a practice that has caused respondent to miss approximately six school days each year. We are asked to determine whether the employer's effort to adjust respondent's work schedule in light of his beliefs fulfills its obligation under section 701(j) of the Civil Rights Act of 1964, 42 U.S.C. section 2000e(j), to "reasonably accommodate to an employee's... religious observance or practice without undue hardship on the conduct of the employer's business."

Since the 1967-1968 school year, the school board's collective-bargaining agreements with the Ansonia Federation of Teachers have granted to each teacher 18 days of leave per year for illness, cumulative to 150 and later to 180 days. Accumulated leave may be used for purposes other than illness as specified in the agreement. A teacher may accordingly use five days' leave for a death in the immediate family, one day for attendance at a wedding, three days per year for attendance as an official delegate to a national veterans organization, and the like....With the exception of the agreement covering the 1967-1968 school year, each contract has specifically provided three days' annual leave for observance of mandatory religious holidays, as defined in the contract. Unlike other categories for which leave is permitted, absences for religious holidays are not charged against the teacher's annual or accumulated leave.

The school board has also agreed that teachers may use up to three days of accumulated leave each school year for "necessary personal business." Recent contracts limited permissible personal leave to those uses not otherwise specified in the contract. This limitation dictated, for example, that an employee who wanted more than three leave days to attend the convention of a national veterans organization could not use personal leave to gain extra days for that purpose. Likewise, an employee already absent three days for mandatory religious observances could not later use personal leave for "[a]ny religious activity,"...or "[a]ny religious observance."...Since the 1978-1979 school year, teachers have been allowed to take one of the three personal days without prior approval; use of the remaining two days requires advance approval by the school principal.

The limitations on the use of personal business leave spawned this litigation. Until the 1976-1977 year, Philbrook observed mandatory holy days by using the three days granted in the contract and then taking unauthorized leave. His pay was reduced accordingly....Philbrook repeatedly asked the school board to adopt one of two alternatives. His preferred alternative would allow use of personal business leave for religious observance, effectively giving him three additional days of paid leave for that purpose. Short of this arrangement, respondent suggested that he pay the cost of a substitute and receive full pay for additional days off for religious observances. Petitioner has consistently rejected both proposals....

We find no basis in either the statute or its legislative history for requiring an employer to choose any particular reasonable accommodation. By its very terms the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation. The employer violates the statute unless it "demonstrates that [it] is unable to reasonably accommodate...an employee's...religious observance or practice without undue hardship on the conduct of the employer's business." Thus, where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship....

...We accordingly hold that an employer has met its obligation...when it demonstrates that it has offered a reasonable accommodation to the employee.

The remaining issue in the case is whether the school board's leave policy constitutes a reasonable accommodation of Philbrook's religious beliefs....We think that the school board policy in this case, requiring respondent to take unpaid leave for holy day observance that exceeded the amount allowed by the collective-bargaining agreement, would generally be a reasonable one. In enacting section 701(j), Congress was understandably motivated by a desire to assure the individual additional opportunity to observe religious practices, but it did not impose a duty on the employer to accommodate at all costs....The provision of unpaid leave eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days and requires him only to give up compensation for a day that he did not in fact work. Generally speaking, "[t]he direct effect of [unpaid leave] is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status."...

But unpaid leave is not a reasonable accommodation when paid leave is provided for all purposes except religious ones. A provision for paid leave "that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free...not to provide the benefit at all."...Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness. Whether the policy here violates this teaching turns on factual inquiry into past and present administration of the personal business leave provisions of the collective-bargaining agreement. The school board contends that the necessary personal business category in the agreement, like other leave provisions, defines a limited purpose level. Philbrook, on the other hand, asserts that the necessary personal leave category is not so limited, operating as an open-ended leave provision that may be used for a wide range of secular purposes in addition to those specifically provided for in the contract, but not for similar religious purposes. We do not think that the record is sufficiently clear on this point for us to make the necessary factual findings, and we therefore affirm the judgment of the Court of Appeals remanding the case to the District Court. The latter court on remand should make the necessary findings as to past and existing practice in the administration of the collective-bargaining agreement.

It is so ordered.

(The district court subsequently found the evidence did not show any animus toward religious activities in the granting of leaves for "necessary personal business.")

AN ELEMENTARY SCHOOL STUDENT HAS NO CLEARLY ESTABLISHED FREE SPEECH RIGHTS.

Baxter v. Vigo County School Corporation
26 F 3d 728 (1994)

United States Court of Appeals, Seventh Circuit

RIPPLE, Circuit Judge.

Wilma and James Baxter, on behalf of their child, Chelsie, appeal the dismissal of their civil rights action....

...[T]he Baxters claim that they attempted to complain about grades, racism, and other unspecified policies at Lost Creek Elementary School. Their daughter wore T-shirts that read "Unfair Grades," "Racism," and "I Hate Lost Creek." The complaint continues by alleging that Ray Azar, principal of the school, prevented their daughter Chelsie from wearing the shirts and subjected her to unspecified punitive actions that prevented her from speaking out on matters of public concern. The complaint also alleges that Azar and an additional defendant, the Vigo County School Corporation ("VCSC") thereby violated Chelsie's rights to freedom of speech, due process, and equal protection....

The Baxters bear the burden of showing that Chelsie enjoyed a clearly established right to wear her expressive T-shirts while in school....[T]hey rely mainly on Tinker. The plaintiffs in Tinker were two high school students and one junior high students, aged 13, all of whom wore black armbands to school to protest the Vietnam War. The students' wearing of black armbands violated school policy, and the students were suspended. The students sued the school district, claiming that their rights under the First Amendment had been violated. In analyzing this claim, the Court began with the proposition that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."...Yet the Court also recognized the need for school officials to be able to maintain order in the schools....The Court believed that these competing concerns could be accommodated by allowing schools to prohibit expression that would "'materially and substantially interfere with the requirement of appropriate discipline in the operation of the school.'"...Because the record in Tinker failed to show any such disruption, the Court held that the school could not prohibit the students from wearing them....Analogizing to Tinker, the Baxters argue that there is no evidence in the record that her T-shirts had any disruptive effect on school discipline; they assert that it was therefore unconstitutional for Azar to prohibit her from wearing them.

Azar does not argue at this stage of the litigation that the

T-shirts caused any disruption; instead, he maintains that Tinker is not dispositive because it involved students older than Chelsie. The Baxters downplay the age difference, arguing that it is merely a "new factual wrinkle" that does not undermine her "clearly established" right to free speech....Since Tinker, however, the Supreme Court has cast some doubt on the extent to which students retain free speech rights in the school setting. In Bethel School District No. 403 v. Fraser,...the Court rejected a First Amendment challenge by students older than Chelsie Baxter due, in part, to the students' age. In that case, the Court considered whether the First Amendment prohibits a school from disciplining a student for making a speech at a school assembly containing a sexual innuendo. In concluding that there was no First Amendment bar to disciplining the student speaker in that circumstance, the Court focused primarily on the sexual nature of the speech. However, the Court also considered the age of the speaker and those in the audience. The Court noted that "[i]t does not follow...that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in public school." ...Hazelwood...[stated] that "a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics").

The parties were unable to find many lower federal court cases that have delved into the area of student speech. Those they have found do not discuss the applicability of the First Amendment to grammar school students....

In this case, Chelsie was in elementary school when her attempts at self-expression were blocked. She was at least several years younger than the youngest student in Tinker. This does not mean that elementary school students are entitled to no First Amendment Protection....But given the indications in Fraser and Kuhlmeier that age is a relevant factor in assessing the extent of a student's free speech rights in school, in addition to the dearth of caselaw in the lower federal courts, we are unable to conclude that the Baxters have demonstrated that the right Azar is alleged to have violated was "clearly established." Thus, Azar in his individual capacity was entitled to qualified immunity with respect to Chelsie's First Amendment claim....

For the foregoing reasons, we affirm the judgment of the district court....

LEWD AND INDECENT SPEECH BY A STUDENT IS NOT PROTECTED BY THE FIRST AMENDMENT.

Bethel School District No. 403 v. Fraser
106 SCt 3159

Supreme Court of the United States

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.

On April 26, 1983, respondent Matthew N. Fraser, a student at Bethel High School in Bethel, Washington, delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students, many of whom were 14-years-old, attended the assembly. Students were required to attend the assembly or to report to the study hall. The assembly was part of a school-sponsored educational program in self-government....During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.

Two of Fraser's teachers, with whom he discussed the contents of his speech in advance, informed him that the speech was "inappropriate and that he probably should not deliver it," and that his delivery of the speech might have "severe consequences."

During Fraser's deliver of the speech, a school counselor observed the reaction of students to the speech. Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class.

A Bethel High School Disciplinary rule prohibiting the use of obscene language in the school provides:

> Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures.

The morning after the assembly, the Assistant Principal called Fraser into her office and notified him that the school considered his speech to have been a violation of this rule. Fraser was presented with copies of five letters submitted by teachers, describing his conduct at the assembly; he was given a chance to explain his conduct, and he admitted to having given the speech described and that he deliberately used sexual innuendo in the speech. Fraser was then informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises.

Fraser sought review of this disciplinary action through the School District's grievance procedures. The hearing officer determined that the speech given by respondent was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly." The examiner determined that the speech fell within the ordinary meaning of "obscene," as used in the disruptive-conduct rule, and affirmed the discipline in its entirety. Fraser served two days of his suspension, and was allowed to return to school on the third day.

Respondent, by his father as guardian ad litem, then brought this action [and]...alleged violation of his First Amendment right to freedom of speech and sought both injunctive relief and monetary damages....The District Court awarded respondent $278 in damages, $12,750 in litigation costs and attorney's fees, and enjoined the School District from preventing respondent from speaking at the commencement ceremonies. Respondent, who had been elected graduation speaker by a write-in vote of his classmates, delivered a speech at the commencement ceremonies on June 8, 1983.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court....

We reverse.

This Court acknowledged in Tinker v. Des Moines Independent Community School Dist.,...that students do not "shed their constitutional right to freedom of speech or expression at the schoolhouse gate."...The Court of Appeals read that case as precluding any discipline of Fraser for indecent speech and lewd conduct in the school assembly. That court appears to have proceeded on the theory that the use of lewd and obscene speech in order to make what the speaker considered to be a point in a nominating speech for a fellow student was essentially the same as the wearing of an armband in Tinker as a form of protest or the expression of a political position.

The marked distinction between the political "message" of the armbands in Tinker and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in Tinker, this Court was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students."

It is against this background that we turn to consider the level of First Amendment protection accorded to Fraser's utterances and actions before an official high school assembly attended by 600 students.

The role and purpose of the American public school system was well described by two historians, saying "public education must prepare pupils for citizenship in the Republic....It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation."...

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of the school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in the schools and classrooms must be balanced against the society's countervailing interesting in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration of the personal sensibilities of the other participants and audiences.

In our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate. The Manual of Parliamentary Practice, drafted by Thomas Jefferson and adopted by the House of Representatives to govern the proceedings in that body, prohibits the use of "impertinent" speech during debate and likewise provides that "[n]o person is to use indecent language against the proceedings of the House."...Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?

The First Amendment guarantees wide freedom in matters of adult public discourse. A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens....It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, that the same latitude must be permitted to children in a public school. In New Jersey v. T.L.O. we reaffirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings....

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools."...The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; school must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers--and indeed the older students--demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapable, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students--indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students....The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as bewildered by the speech and the reaction of mimicry it provoked.

This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children....These cases recognize the obvious concern on the part of parents, and school authorities acting in loco parentis to protect children--especially in a captive audience--from exposure to sexually explicit, indecent, or lewd speech.

We have also recognized an interest in protecting minors from exposure to vulgar and offensive spoken language....

We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in Tinker, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed toward an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education....

Respondent contends that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech in question would subject him to disciplinary sanctions. This argument is wholly without merit. We have recognized that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." Given the schools' need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions. Two days' suspension from school does not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution. The school disciplinary rule proscribing "obscene" language and the prespeech admonitions of teachers gave adequate warning to Fraser that his lewd speech could subject him to sanctions.

The judgment of the Court of Appeals for the Ninth Circuit is

Reversed.

A TEACHER HAS A RIGHT TO A HEARING CONCERNING STIGMATIZING INFORMATION IN HIS PERSONNEL FILE.

Brandt v. Board of Co-op. Educational Services
820 F 2d 41 (1987)

United States Court of Appeals, Second Circuit

FEINBERG, CHIEF JUDGE. This appeal concerns whether appellant Wayne Brandt, after his dismissal as a public school teacher, was entitled to a name-clearing hearing pursuant to 42 U.S.C. section 1983 based on the presence of allegedly false and defamatory charges in his personnel file. In October 1980, the Board of Cooperative Education Services, Third Supervisory District, Suffolk County, New York...appointed Brandt as a substitute teacher of autistic children....[I]n March and April 1981, appellees...charged Brandt with various acts of sexual misconduct involving his students. Despite pressure from appellees, Brandt refused to resign. His demand for a hearing to clear himself of the charges was denied. He was discharged in April 1981, in the middle of his term....

...Brandt sought relieve in federal court...claiming that appellees had violated his right to liberty under the Fourteenth Amendment....

A government employee's liberty interest is implicated when the government dismisses him based on charges "that might seriously damage his standing and association in his community" or that might impose "on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." Board of Regents of State Colleges v. Roth. In addition, the charges against the employee must be made "public" by the government employer, Bishop v. Wood, and the employee must allege that the charges are false, Codd v. Velger. Where the employee's liberty interest is implicated, he is entitled under the due process clause to notice and an opportunity to be heard.

The issue before us is whether the district court properly granted summary judgment to appellees based on its ruling that Brandt must prove that appellees had actually disclosed false allegations of sexual misconduct....The Supreme Court has required only that a plaintiff raise the issue of falsity regarding the stigmatizing charges--not prove it--in order to establish a right to a name-clearing hearing. Here, Brandt satisfied that requirement by alleging in his complaint that the charges were false. The truth or falsity of the charges would then be determined at the hearing itself. If Brandt had to prove the falsity of the charges before he could obtain a hearing, there would be no need for the hearing.

Appellees do not contest that point but they argue that under Bishop no liberty interest is implicated where there has been no public disclosure of the reasons for the discharge. Brandt has conceded that appellees have disclosed the charges against him only to those involved in the investigation. Brandt argues, however, that the presence of the charges in his personnel file satisfied the "public disclosure" requirement because there is a likelihood that these charges may be disclosed in the future. He claims that prospective employers will want to know about his qualifications as a teacher, will gain access to the file and "will most certainly not hire him" when they learn of the charges.

...The Board's counsel stated that he believed the Board's policy was to not disclose but Brandt vigorously contested this representation. Thus there was a genuine issue of fact regarding the likelihood of disclosure to Brandt's prospective employers. The question now is whether the likelihood of such disclosure is material to Brandt's claim, and we conclude that it is.

...[W]here the reasons for an employee's termination are kept private, it is clear that the "public disclosure" requirement has not been met and there has been no violation of the employee's liberty interest. The purpose of the requirement is to limit a constitutional claim to those instances where the stigmatizing charges made in the course of discharge have been or are likely to be disseminated widely enough to damage the discharged employee's standing in the community or foreclose future job opportunities. In determining the degree of dissemination that satisfies the "public disclosure" requirement, we must look to the potential effect of dissemination on the employee's standing in the community and the foreclosure of job opportunities. As a result, what is sufficient to constitute "public disclosure" will vary with the circumstances of each case.

...If Brandt is able to show that prospective employers are likely to gain access to his personnel file and decide not to hire him, then the presence of the charges in his file has a damaging effect on his future job opportunities. Brandt need not wait until he actually loses some job opportunities because the presence of the charges in his personnel file coupled with a likelihood of harmful disclosure already place him "between the devil and the deep blue sea." In applying for jobs, if Brandt authorizes the release of his personnel file, the potential employer would find out about the allegations of sexual misconduct and probably not hire him. If he refused to grant authorization, that, too, would hurt his chances for employment. Thus, Brandt...would not be "as free as before to seek another" job....

...The stigmatizing charges of sexual misconduct were made against Brandt during the course of his termination and apparently were placed in his personnel file at that time. Brandt has alleged that the charges are false, and has raised a genuine issue of fact concerning the likelihood of future disclosure. Any disclosure of the charges to prospective employers would inevitably deprive Brandt of job opportunities. We therefore...hold that Brandt must have an opportunity to prove that his liberty interest has been implicated.

We reverse....Brandt must be given the opportunity to substantiate his contention that appellees are likely to make his personnel file available to prospective employers....

STUDENT'S INTERVENING CULPABLE ACT OF STEALING CHEMICALS ABSOLVED THE SCHOOL BOARD OF LIABILITY.

Brazell v. Board of Education of Niskayuna Public Schools
557 NYS 2d 645 (1990)

New York Supreme Court, Appellate Division

HARVEY, Justice....Plaintiff commenced this personal injury action to recover for damages caused when her teen-aged son Colin stole an oxidizing agent (sodium chlorate) from defendant's [school's] science lab during school hours on April 23, 1987. A fire somehow started later that night at Plaintiff's home and burned Colin's leg and personal property belonging to plaintiff. As a result, plaintiff basically alleges that defendant negligently supervised and allowed the boy to have access to the dangerous chemical without adequate warnings or precautions. Defendant denied these allegations and raised contributory negligence as a defense. Defendant brought a motion for summary judgment claiming, among other things, that Colin's wrongful act in stealing the chemicals was the sole proximate cause of his injuries. Supreme Court denied defendant's motion and this appeal ensued.

There must be a reversal. In our view, Supreme Court incorrectly denied defendant's motion for summary judgment....In his testimony, Colin relates that his science class on the day of the accident was conducted from approximately 1:45 P.M. to around 2:30 P.M. An assignment that day was to measure out five grams of sodium chlorate with his lab partner to put aside for an experiment for the next class. After taking the container and measuring the five grams, Colin admitted he took an unspecified extra amount of the chemical and secreted it in his pants pocket so that he could take it home to burn with matches. He claims that he was told by another student that the chemical would burn and sparkle like fire crackers if ignited. Significantly, Colin admits that his teacher specifically told the class to never remove chemicals from the classroom and also that his teacher had gone over the safety procedures in the classroom with him. Once Colin had taken the chemical, he carried it around in his pocket all day until approximately 10:00 P.M. when he was upstairs in his bedroom with two younger cousins. At that time, Colin claimed that the chemical spontaneously ignited in his pocket causing him injuries. Although Colin claimed that there were no matches in his room, this assertion is contradicted by the police report attached to defendant's papers stating that two matchbook pieces were found at the scene.

...Plaintiff argues that there are still questions of fact as to how detailed the science teacher's warnings were and how adequate the safety precautions were. Plaintiff points out, based on the teacher's deposition, that the chemical was not kept in a locked desk. However, because the chemical was being used in class that day and Colin received it from the teacher himself for class use, this fact is hardly surprising and raises no inference of negligence. In any event, it is our opinion that even if the science teacher was negligent in any way by reason of being unable to watch some 28 students every minute of the time they were there, Colin's intervening culpable act in intentionally staling the chemical constituted a superseding force absolving defendant from any liability....It is clear from Colin's own testimony that his conduct, aside from being unforeseeable by others, went beyond mere contributory negligence and rose to such a level of culpability as to replace any negligence on the part of defendant as the legal cause of the accident....

...Here, Colin's classroom was supervised, the rules were clear and there is no evidence that anyone knew, other than the teenaged boys themselves, that chemicals were being taken....The fact that it was possible to sneak chemicals out of the room without the teacher's knowledge does not make the outcome that occurred in this case a probable one....[W]e reverse and grant defendant's motion for summary judgment dismissing the complaint....

PROCEDURAL DUE PROCESS MUST BE GRANTED A TEACHER BEFORE A STATE MAY REMOVE A TEACHING CERTIFICATE.

Brown v. South Carolina State Board of Education
391 SE 2d 866 (1990)

Supreme Court of South Carolina

GREGORY, CHIEF JUSTICE. This appeal is from a circuit court order affirming respondent's (Board's) invalidation of appellant's teaching certificate. We reverse and remand.

Appellant took the National Teacher's Examination (NTE) for elementary school teachers which is administered by Educational Testing Service (ETS). On March 28, 1987, ETS reported to the State Department of Education (Department) that appellant had achieved a passing score. The Department then issued appellant a teaching certificate valid through June 1990.

With certificate in hand, appellant applied for a teaching position with the Dorchester County School District No. 4. The superintendent of schools who interviewed appellant noted that her NTE scores were at the 78th percentile nationally, well above the required score of 50 percent. Because of this and other qualifications, appellant was offered a position as a second grade teacher. She performed satisfactorily on the job.

On January 25, 1988, the Department received a report from ETS stating simply that appellant's March 28, 1987, NTE scores had been "canceled" and directing the Department to "delete them from your records." The Department then advised appellant that because her NTE scores had been canceled, her teaching certificate was no longer valid and she could qualify for certification only upon presentation of a valid passing NTE score. At appellant's request, a hearing was scheduled and the invalidation was suspended until that time.

A hearing was held before the Teacher Recruitment, Training, and Certification Committee of the Board. The only evidence produced at the hearing to support invalidation of appellant's teaching certificate was the notification from ETS that her NTE scores had been canceled. The Committee recommended appellant's teaching certificate be invalidated and the Board affirmed that decision. On appeal to the circuit court, the Board's decision was affirmed and this appeal followed.

Appellant contends the regulation under which her teaching certificate was invalidated is unconstitutional because it violates her right to procedural due process. reg. 43-59 provides:

> If any testing company invalidates a test score, the State Board of Education shall accept that determination and, if a teaching certificate has been issued based upon the invalid score, shall automatically invalidate that certificate effective the date of receipt of notification of the score invalidity by the Office of Teacher Education and Certification.

The fourteenth amendment Due Process Clause requires procedural due process be afforded an individual deprived of a property or liberty interest by the State. The right to hold specific employment and the right to follow a chosen profession free from unreasonable governmental interference come within the liberty and property interests protected by the Due Process Clause. The liberty interest at stake is the individual's freedom to practice his or her chosen profession; the property interest is the specific employment. When the State seeks to revoke or deny a professional license, these interests are implicated and procedural due process requirements must be met. The State must afford notice and the opportunity for a hearing appropriate to the nature of the case.

Where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. Procedural due process often requires confrontation and cross-examination of one whose word deprives a person of his or her livelihood. Moreover, the evidence used to prove the State's case must be disclosed to the individual so that he or she has an opportunity to show it is untrue.

We hold Reg. 43-59 unconstitutional because it does not provide for notice and an opportunity to be heard when the State deprives a teacher of his or her teaching certificate. The fact that appellant was granted a hearing as a matter of favor in this case does not save the regulation from constitutional attack under the Due Process Clause. Further, the hearing appellant was granted did not comport with procedural due process since the board did not disclose any evidence substantiating cancellation of the NTE scores in order to allow appellant the opportunity to contest the allegations against her.

The Board contends appellant cannot complain she was deprived of due process because she failed to avail herself of ETS procedure to contest the cancellation of her scores. On the record before us, however, ETS procedure does not provide for any hearing whereby appellant could confront her accusers. The Board further contends it could not obtain information from ETS regarding cancellation of appellant's scores absent her consent which she refused to give. The record, however, reveals no attempt by the Board to obtain information regarding cancellation of appellant's test scores from ETS....

Reversed....

LACK OF REASONABLE CARE IN DISPOSING OF DUPLICATING FLUID IMPOSES LIABILITY ON THE SCHOOL BOARD.

Brown v. Tesack
566 So 2d 955 (1990)

Supreme Court of Louisiana

SHORTNESS, Justice. Pro Tem. On the afternoon of August 28, 1984, during summer recess, Leonard Kisack, age 13, and Gerald Preston (over 12) obtained four partially-used cans of flammable duplicating fluid from a red metal garbage dumpster located in the rear of the Henderson H. Dunn Elementary School (Dunn School)....

Some time prior to August 28, 1984, an employee of the Dunn School disposed of a number of cans containing varying amounts of duplicating fluid in the dumpster. Leonard and Gerald took four cans from the dumpster to a courtyard in the Desire Housing Project where they lived and began to play with the fluid by creating small fires. Plaintiff lived in the project but was not a party to these activities. Gerald returned to the dumpster for an additional can of fluid later that evening and began pouring fluid onto an already burning plastic milk carton. Plaintiff came around a corner and onto the scene, was struck in the chest by a "fireball," and was severely burned over an extensive position of his face and body.

The trial court held that the Board had a duty to properly dispose of the duplicating fluid, citing its knowledge of the likelihood that children would play in and around the dumpster and that the Dunn School was commonly the target of vandals. Wilbert F. Dunn, principal at Dunn School,...testified that he took significant precautionary measures to keep the fluid secure, including: storing the unused cans in a room to which only he, the assistant principal, and the chief custodian possessed keys;...and collecting partially used cans and storing them securely during school holidays. Dunn candidly explained the purpose of these safeguards:

> We were aware of the fact that Dunn School had a history of break-ins and vandalism and we did not want duplicating fluid to be used in setting fires.

The duty to properly dispose of the duplicating fluid arose because the liquid is flammable and the risk of harm, i.e., physical injury resulting from its flammability, was specifically recognized by the Board....

...The testimony is uncontroverted that a "fireball" was projected from the can of fluid. Moreover, the Board's policy manifests a self-imposed duty to properly store the substance.

Clearly, these precautions were taken to ensure that the fluid did not fall into the hands of their parties--possibly children; the risk that it could were there precautions not taken, therefore, was not only foreseeable but foreseen. The operative risk of harm here, misuse of the fluid causing injury to persons or property from fire, was no less foreseeable. The record establishes that Board personnel were well aware that children played on the school grounds and rummaged in the dumpster. A duty was owed both to these children and to their potential victims....We agree..."children who possess a flammable substance can be expected to light it, to attract other children to join in the play and to commit criminal acts or engage in other misadventures."

We conclude that plaintiff's injuries were reasonably foreseeable....The recognition by the Board that this duplicating fluid was a dangerous substance to be treated with special precautions, leads directly to the conclusion that it was not reasonable to dispose of several partially full cans in the Dunn School dumpster.

We must conclude that the evidence does show a breach of the duty to properly dispose of the duplicating fluid, irrespective of the length of time that the cans remained in the dumpster prior to the accident....Putting children and flammable mixtures together, unfortunately, more often than not, produces combustion. The risk of burn injuries resulting from children playing with the duplicating fluid was squarely within the scope of the duty to properly dispose of the fluid, and the Board must share responsibility for plaintiff's injuries.

...The judgments of the trial court and court of appeal dismissing plaintiff's suit against the School Board are reversed.

A SCHOOL BOARD HAS THE DISCRETION TO SELECT A TEACHER WITH GREATER TEACHING EXPERIENCE, RATHER THAN A TEACHER WITH HIGHER DEGREES.

Butcher v. Gilmer County Board of Education
429 SE 2d 903 (1993)

Supreme Court of Appeals of West Virginia

PER CURIAM:

This is an appeal by Nasia Butcher from a December 10, 1991, order of the Circuit Court of Kanawha County denying the Appellant relief from a decision of the hearing examiner for the West Virginia Education and State Employee's Grievance Board. The Appellant contends that she should have received a teaching position with the Gilmer County Board of Education ("the Board"). We disagree and affirm the decision of the Circuit Court of Kanawha County.

The Appellant received her Bachelor's degree in Journalism, minoring in Economics and Marketing, and thereafter earned a Masters degree in Education Administration. At the time a decision on the disputed position was contemplated, she was certified to teach English and Language Arts, grades five through twelve, and was one course short of the requirements for certification in Developmental Reading....Her actual teaching experience consisted of substitute teaching for Gilmer and Calhoun Counties in the 1987-88 and 1988-89 school years. During her tenure at Calhoun County High School, she had taught English and eighth-grade Language Arts and she had been involved with the yearbook staff. Immediately prior to her application for the position in question, the Appellant was employed by the Calhoun-Gilmer Vocational Technical Center as an itinerant English teacher.

In June 1989, the Appellant applied for a full-time teaching position of "Language Arts/Developmental Reading Teacher Gilmer County High School 7-12."...[T]he Appellant was formally recommended by both Mr. Lambert [superintendent] and Dr. Butler [principal] during a July 13, 1989, meeting of the Board. The motion, however, failed for lack of a second. The position was thereafter re-posted, and the Appellant submitted her name as an applicant again. During an August 14, 1989, meeting of the Board, a motion was made to transfer Ms. Tina Lou Duelley to the position. That motion passed, and Ms. Duelley was granted the position.

The successful applicant, Ms. Duelley, was certified in Language Arts, levels five through eight. She had completed all courses for a certification in Developmental Reading but had not yet received her permit. She had been employed for five years as a elementary teacher in Gilmer County. She had also taught reading labs, newspaper classes, creative writing, and research paper classes in grades five through eight. Additionally, she had experience teaching Language Arts in grades seven and eight....

...While the Appellant contends that the Board based its decision primarily on seniority without proper emphasis on qualifications, the Appellee argues that the decision was properly based upon the relative qualifications of the candidates. The Board contends that if it had in fact relied upon seniority, as the Appellant contends, a third candidate not involved in this litigation would have received the position. That third party was not granted the position, however, because her qualifications were not as strong as those of Ms. Duelley. The Appellant contends that from references by Board members to "experience," we may infer improper reliance upon "seniority" issues. As the Board stresses, however, emphasis on the relative classroom experience of the candidates does not necessarily imply that the Board was improperly relying upon the seniority question....

Upon examination of the record in the present case ,we conclude (1) that the Board did not abuse its discretion by failing to hire the Appellant in the position of teacher of Language Arts/Developmental Reading, and (2) that the Board did not illegally rely upon the seniority issue in reaching its conclusion. While seniority is not to become a decisive factor except in limited circumstances, the related issue of actual teaching experience must be acknowledged as relevant. Ms. Duelley had over five years of teaching experience; the Appellant had only 100 days of experience as a substitute teacher. Certainly that difference cannot be disregarded under the guise of refraining from relying upon the issue of seniority. While the Appellant had a Masters Degree in Educator Administration, Ms. Duelley had considerably more experience in the performance of tasks associated with the position to be filled. These are valid considerations which are well within the discretion of the Board to examine. While the Board acknowledges the Appellant's impressive qualifications, it maintains that Ms. Duelley demonstrated greater qualification for the particular position in question. Both the Board and the Hearing Examiner conducted thorough investigations, regarding the candidates' qualifications, credentials, and experience. The Hearing Examiner...found that the Board members had not improperly relied upon seniority as a basis for their decision. We do not believe this factual finding to be clearly wrong; nor do we believe that this determination was based upon an improper conclusion of law.*

...[A]ffirmed....

*...the Board's use of the term seniority is subject to more than one interpretation....

A SCHOOL OFFICIAL MAY ASSIST A POLICE OFFICER IN A THE SEARCH OF A STUDENT.

Cason V. Cook
810 F 2d 1988 (1987)

United States Court of Appeals, Eighth Circuit

...Shy [Cason] was a student at North High School in Des Moines, Iowa. At approximately 12:20 p.m. on...[May 1, 1983] a student approached the appellee Connie Cook, the vice-principal of North High School, and told her that her locker had been broken into and that she was missing a pair of sweatpants and a duffle bag. She also reported that a friend was missing a pair of sweatpants. At approximately 12:40 p.m., another student approached Ms. Cook and reported that her wallet and coin purse had been taken from her gym locker. The student reported that the wallet contained $65 along with several credit cards. Ms. Cook recorded a detailed description of the missing items.

Standing with Ms. Cook when these reports were made was the appellee Wanda Jones, a police officer who had been assigned to North High School as a liaison officer pursuant to an established police liaison program between the Des Moines Police Department and the school district. The officer does not wear a police uniform and drives an unmarked automobile. The liaison officer is instructed to cooperate with the school officials.

After receiving the reports of stolen items, Ms. Cook decided to investigate the alleged thefts and asked Ms. Jones if she would accompany her to the locker room. Ms Cook interviewed several students in the locker room and was supplied with the names of four students who had been seen in the locker area around the time of the thefts; Shy Cason, Jerrie Harvey, Monica Harvey and Tabatha Prather. These four students did not have permission to be in the locker area at this time nor were they assigned to the gym class of the prior period. Ms. Cook also recalled having seen Shy, Jerrie and Monica together in the lobby just prior to receiving the reports of the thefts.

Ms. Cook and Ms. Jones then proceeded to the office where Ms. Cook checked the schedules of the four students. Ms. Cook gain asked Ms. Jones to accompany her as she interviewed each of the students. Jerrie was removed from her classroom by Ms. Cook and was taken into an empty classroom where she was questioned. Ms. Jones did not participate in this questioning and in fact, remained in the hallway during this time period. Shy and Monica were then removed from their classroom and taken into an empty restroom. Shy testified that Monica remained outside and that she was taken into the restroom and that Ms. Cook locked the door. Ms. Jones was also inside the locked restroom but again did not participate in any questioning of Shy.

Ms. Cook informed Shy why she was being questioned and allowed Shy an opportunity to respond. After Shy admitted being in the locker room but denied having any of the missing items, Ms. Cook told Shy that she was going to search her purse. Ms. Cook then took Shy's purse and dumped the contents onto a shelf in the restroom. In Shy's purse was a coin purse that matched exactly the description of the missing coin purse. After this purse was found, Shy testified that Ms. Jones conducted a pat-down search of Shy from her shoulders to her toes while Shy was made to stand against the wall with her hands up and legs spread.

Monica and Shy were then taken to the office area and on the way, Shy was asked by Ms. Cook to open her locker and a search of the locker was conducted by Ms. Cook. At the office, Monica and Shy were placed in separate rooms with Ms. Jones remaining with Monica while Ms. Cook continued to question Shy. Ms. Jones did not participate in the questioning of either Shy or Monica at this point. It was learned that Shy and Jerrie were in fact involved with the thefts and Jerrie was summoned to come to the office. Ms. Jones did participate in a joint interview with Shy and Jerrie and when the two girls could not agree on the events that had transpired in the locker room, Ms. Jones presented each girl with a juvenile appearance card. Juvenile appearances are utilized by the police liaison program whenever possible in lieu of an arrest. The card required each of the girls and their parents to report to Ms. Jones' office at the police station on May 19, 1983.

Shy's mother was not made aware of the events of this day until she arrived to pick up Shy after school. No attempt was made to contact Shy's mother prior to any questioning or the search of Shy and her possessions. While at school, Shy was not informed of a right to remain silent or of a right to counsel. Both Shy and her mother signed a waiver and consent form before they visited with Ms. Jones at her office on the 19th. Each of the girls was suspended from school and after meeting with Ms. Jones no further action was taken....In 1985, The Supreme Court addressed the Fourth Amendment and its application in the school setting....[T][he Court held that the Fourth Amendment to be free from unreasonable search and seizure applies to a search by a school official.

After the Court determined that the Fourth Amendment applied in the school setting, it further discussed the extent of the protection afforded the schoolchildren. Balancing the interests of the children's p[rivacy and the need to maintain discipline in the school setting, the Court held that the warrant requirement was unsuited to the school environment: "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools."...In addition to eliminating the warrant requirement, the Court also reduced the level of suspicion of illicit activity that is needed to justify a search. "[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."

In determining whether a given search is reasonable, the Court provided further guidance: The inquiry into the reasonableness of a search is twofold: First, the action must be justified at its inception and second, the scope of the search must be reasonably related to the circumstances which justified the interference in the first place....A search satisfies the first inquiry when there are reasonable grounds for suspecting that the search will uncover evidence of a rule or criminal violation. The second inquiry is satisfied when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." ...

The Court did note, however, that it was *not* addressing the question of what standard would apply when a search is conducted by school officials *in conjunction with* or *at the behest of* law enforcement agencies and expressed no opinion on that subject.... This is the precise question that is presented to this court by the case at bar: Whether the reasonableness standard should apply when a school official acts in conjunction with a police liaison officer. The district court found that the reasonableness standard was the correct standard and that the appellee Cook had met this standard and thus there was no violation of the appellant's constitutional rights. We agree.

There is no evidence to support the proposition that the activities were at *the behest of* a law enforcement agency. The uncontradicted evidence showed that Ms. Cook, the school official, conducted the investigation of the thefts that had been reported to her. Ms. Jones' involvement was limited to a pat-down search conducted after a coin purse matching the description of the one stolen was found and to briefly interviewing Shy and Jerrie....At most, then, this case represents a police officer working *in conjunction with* school officials.

...The imposition of a probable cause warrant requirement based on the limited involvement of Ms. Jones would not serve the interest of preserving swift and informal disciplinary procedures in schools. Ms. Jones did not conduct any of the initial interviews of the students and participated in a pat-down search only after evidence was discovered. Ms. Cook, on the other hand, made the initial determination to investigate the reported thefts and conducted the investigation. This school official procured the names of four students who had been seen in the locker room area at an unscheduled time and without permission. Ms. Cook also recalled having personally observed these same students together in the hall just prior to receiving the reports of the thefts. The students were removed from their classrooms by Ms. Cook and each was provided with an explanation as to the reason for their removal and was provided with an opportunity to respond prior to any search.

It was Ms. Cook who conducted the search of Shy's purse which led to the discovery of the coin purse. It was only after this discovery that Ms. Jones conducted a limited pat-down search of Shy. The only other involvement of the police liaison officer occurred when the students were unable to agree on the events that had transpired in the locker room. This involvement was limited to some questioning and the issuance of juvenile appearance cards.

It is clear that the correct standard to apply under the circumstances presented in this case is the standard enunciated by the Court in T.L.O; Whether the search was reasonable under all the circumstances. Based on the foregoing discussion of the facts, the initial search of the appellant's purse was based on a reasonable suspicion that Shy Cason had been involved in a violation of school rules and of the criminal law. The subsequent pat-down search was made when this suspicion was increased due to the finding of physical evidence in the appellant's possession. In addition, the scope of the search was reasonable. The theft victim had reported $65 as missing along with her wallet. Due to the nature of this missing item, patting down the appellant was not "excessively intrusive in light of the age and sex of the student and the nature of the infraction."...We do not hold that a search of a student by a school official working in conjunction with law enforcement personnel could never rise to a constitutional violation, but only that under the record as presented to the court, no such violation occurred here....

Since we have found no constitutional violation, the remaining allegations against the Des Moines Police Department, the appellee Anderson and the Des Moines Independent School District need not be addressed....

Accordingly, the order of the district court is affirmed.

A SCHOOL DISTRICT MAY NOT BAR AN "OTHERWISE QUALIFIED" TEACHER WITH AIDS FROM TEACHING IN THE CLASSROOM.

Chalk v. United States District Court
Central District of California
840 F 2d 701 (1988)

United States Court of Appeals

POOLE, Circuit Judge. Petitioner Vincent L. Chalk is a certified teacher of hearing-impaired students in the Orange County Department of Education. In February of 1987, Chalk was diagnosed as having Acquired Immune Deficiency Syndrome (AIDS). Subsequently, the Department reassigned Chalk to an administrative position and barred him from teaching in the classroom. Chalk then filed this action in the district court, claiming that the Department's action violated section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A section 794 (West Supp. 1987), as amended, which proscribes recipients of federal funds from discriminating against otherwise qualified handicapped persons.

Chalk's notion for a preliminary injunction ordering his reinstatement was denied by the district court, and Chalk brought this appeal. After hearing oral argument, we issued an order reversing the district court and directing it to issue the preliminary injunction....In this opinion, we now set forth in full the reasons underlying our reversal....

Chalk bases his claim on section 504 of the Rehabilitation Act of 1973, 29 U.S.C. section 794, as amended (the Act), which provides:

> No otherwise qualified individual with handicaps... shall, solely by reason of his handicap, be excluded from the participation in...or be subjected to discrimination under any program or activity receiving Federal financial assistance.

As the district court recognized, the Supreme Court recently held that section 504 is fully applicable to individuals who suffer from contagious diseases. School Bd. of Nassau County v. Arline....

In its opinion, the Court addressed the question which is of central importance to this case: under what circumstances may a person handicapped with a contagious disease be "otherwise qualified" within the meaning of section 504? Relying on its earlier opinion in Southeastern Community College v. David,...the Court said:

> An otherwise qualified person is one who is able to meet all of the program's requirements in spite of his handicap. In the employment context, an otherwise qualified person is one who can perform "the essential functions" of the job in question. When a handicapped person is not able to perform the essential functions of the job, the court must also consider whether any "reasonable accommodation" by the employer would enable the handicapped person to perform those functions. Accommodations is not reasonable if it either imposes "undue financial and administrative burdens" on a grantee, or requires a "fundamental alteration in the nature of [the] program." (Arline)...

...[T]his Court recognized the difficult circumstances which confront a handicapped person, an employer, and the public in dealing with the possibility of contagion in the workplace. The problem is in reconciling the needs for protection of other persons, continuation of the work mission, and reasonable accommodation--if possible--of the afflicted individual. The Court effected this reconciliation by formulating a standard for determining when a contagious disease would prevent an individual from being "otherwise qualified":

> a person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk. The Act would not require a school board to place a teacher with active, contagious tuberculosis in a classroom with elementary school children....

The application of this standard requires, in most cases, an individualized inquiry and appropriate findings of fact, so that "section 504 [may] achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."...Specifically, Arline requires a trial court to make findings regarding four factors: "(a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm."...Findings regarding these factors should be based "on reasonable medical judgments given the state of medical knowledge," and courts should give particular deference to the judgments of public health officials.

Chalk submitted in evidence to the district court, and that court accepted, more than 100 articles from prestigious medical journals and the declarations of five experts on AIDS, including two public health officials of Los Angeles County. Those submissions reveal an overwhelming evidentiary consensus of medical and scientific opinion regarding the nature and transmission of AIDS....

Transmission of HIV is known to occur in three ways: (1) through intimate sexual contact with an infected person; (2) through invasive exposure to contaminated blood of certain other bodily fluids, or (3) through perinatal exposure (i.e., from mother to infant). Although HIV has been isolated in certain other bodily fluids, epidemiologic evidence has implicated only blood, semen, vaginal secretions, and possibly breast milk in transmission. Extensive and numerous studies have consistently found no apparent risk of HIV infection to individuals exposed through close, non-sexual contact with AIDS patients.

Based on the accumulated body of medical evidence, the Surgeon General of the United States has concluded:

> There is no known risk of non-sexual infection in most of the situations we encounter in our daily lives. We know that family members living with individuals who have the AIDS virus do not become infected except through sexual contact. There is no evidence of transmission (spread) of AIDS virus by everyday contact even though these family members shared food, towels, cups, razors, even toothbrushes, and kissed each other....

The district judge addressed each of the four Arline factors in his ruling. He found that the duration of the risk was long and the severity was "catastrophic," but that scientifically established methods of transmission were unlikely to occur and that the probability of harm was minimal. He therefore concluded that Chalk "may very well win ultimately." Nonetheless, the district just expressed skepticism about the current state of medical knowledge. He was troubled that there might be something yet unknown to science that might do harm....

...Little in science can be proved with complete certainty, and section 504 does not require such a test. As authoritatively construed by the Supreme Court, section 504 allows the exclusion of an employee only if there is "a significant risk of communicating an infectious disease to others."...In addition, Arline admonishes courts that they "should defer to the reasonable medical judgments of public health officials."...The district judge ignored these admonitions. Instead, he rejected the overwhelming consensus of medical opinion and improperly relied on speculation for which there was no credible support in the record....

Viewing Chalk's submissions in light of these cases, it is clear that he has amply demonstrated a strong probability of success on the merits. We hold that it was error to require that every theoretical possibility of harm be disproved....

We conclude that petitioner met all of the requirements necessary to receive a preliminary injunction. We therefore reverse the District Court's order and remand this action with direction to enter a preliminary injunction ordering defendants forthwith to restore petitioner to his former duties as a teacher of hearing-impaired children in the Orange County Department of Education....

Reversed and remanded.

A NONTENURED SCHOOL EMPLOYEE WHO MAY BE DISCHARGED FOR CAUSE IS DUE ONLY A NOTICE AND THE OPPORTUNITY TO RESPOND.

Cleveland Bd. of Educ. v. Loudermill
Parma Board of Education v. Donnelly
105 SCt 1487 (1985)

Supreme Court of the United States

JUSTICE WHITE delivered the opinion of the Court.

In these cases we consider what pretermination process must be accorded a public employee who can be discharged only for cause.

In 1979 the Cleveland Board of Education...hired respondent James Loudermill as a security guard. On his job application, Loudermill stated that he had never been convicted of a felony. Eleven months later, as part of a routine examination of his employment records, the Board discovered that in fact Loudermill had been convicted of grand larceny in 1968. By letter dated November 3, 1980, the Board's Business Manager informed Loudermill that he had been dismissed because of his dishonesty in filling out the employment application. Loudermill was not afforded an opportunity to respond to the charge of dishonesty or to challenge his dismissal. On November 13, the Board adopted a resolution officially approving the discharge.

Under Ohio law, Loudermill was a "classified civil servant." ...Such employees can be terminated only for cause, and may obtain administrative review if discharged. Section 124.34.... Loudermill filed an appeal with the Cleveland Civil Service Commission on November 12. The Commission appointed a referee, who held a hearing on January 29, 1981. Loudermill argued that he had thought that his 1968 larceny conviction was for a misdemeanor rather than a felony. The referee recommended reinstatement. On July 20, 1981, the full Commission heard argument and orally announced that it would uphold the dismissal....

...Loudermill...brought the present suit in the Federal District Court for the Northern District of Ohio. The complaint alleged that section 124.34 was unconstitutional on its face because it did not provide the employee an opportunity to respond to the charges against him prior to removal. As a result, discharged employees were deprived of liberty and property without due process....

The other case before us arises on similar facts and followed a similar course. Respondent Richard Donnelly was a bus mechanic for the Parma Board of Education. In August 1977, Donnelly was fired because he had failed an eye examination. He has offered a chance to retake the examination but did not do so. Like Loudermill, Donnelly appealed to the Civil Service Commission. After a year of wrangling about the timeliness of his appeal, the Commission heard the case. It ordered Donnelly reinstated, though without backpay. In a complaint essentially identical to Loudermill's, Donnelly challenged the constitutionality of the dismissal procedures....

Respondents' federal constitutional claim depends on their having had a property right in continued employment. Board of Regents v. Roth. If they did, the State could not deprive them of this property without due process.

Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law...." Board of Regents v. Roth. The Ohio statute plainly creates such an interest. Respondents were "classified civil service employees," entitled to retain their positions "during good behavior and efficient service," who could not be dismissed except...for...misfeasance, malfeasance, or nonfeasance in office." The statute plainly supports the conclusion...that respondents possessed property rights in continued employment....

The Parma Board argues, however, that the property right is defined by, and conditioned on, the legislature's choice of procedures for its deprivation. The Board stresses that in addition to specifying the grounds for termination, the statute sets out procedures by which termination may take place. The procedures were adhered to in these cases. According to petitioner, "[t]o require additional procedures would in effect expand the scope of the property interest itself."...

...[This] Court has clearly rejected [this argument]. In Vitek v. Jones,...we pointed out that "minimum [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official action."...

...The point is straightforward: the Due Process Clause provides that certain substantive rights--life, liberty, and property--cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee...."

In short, once it is determined that the Due Process Clause applies, "the question, remains what process is due." The answer to that question is not to be found in the Ohio statute.

An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case."...We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment...Roth, Perry v. Sindermann....Even decisions finding no constitutional violation in termination procedures have relied on the existence of some pretermination opportunity to respond....

The need for some form of pretermination hearing, recognized in these cases, is evident from a balancing of the competing interests at stake. These are the private interests in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination....

...We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.

Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes effect....

The cases before us illustrate these considerations. Both respondents had plausible arguments to make that might have prevented their discharge. The fact that the Commission saw fit to reinstate Donnelly suggests that an error might have been avoided had he been provided an opportunity to make his case to the Board. As for Loudermill, given the Commission's ruling we cannot say that the discharge was mistaken. Nonetheless, in light of the referee's recommendation, neither can we say that a fully informed decisionmaker might not have exercised its discretion and decided not to dismiss him, notwithstanding its authority to do so. In any event, the termination involved arguable issues (Loudermill's dismissal turned...on the subjective question whether he had lied on his application form. His explanation for the false statement is plausible in light of the fact that he received only a suspended 6-month sentence and a fine on the grand larceny conviction.), and the right to a hearing does not depend on a demonstration of certain success.

The governmental interest in immediate termination does not outweigh these interests...[A]ffording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden or intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. A governmental employer also has an interest in keeping citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.

The foregoing considerations indicate that the pretermination "hearing," though necessary, need not be elaborate...In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. Under state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.

...[T]he pretermination hearing need not definitively revolve the propriety of the discharge. It should be an initial check against mistaken decisions--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

The essential requirements of due process...are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee....

We conclude that all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute....

A TEACHING CERTIFICATE MAY BE REVOKED IF A TEACHER WEARS RELIGIOUS GARB IN SCHOOL CONTRARY TO A STATUTORY PROHIBITION AGAINST SUCH.

Cooper v. Eugene School District No. 4J
723 P 2d 298 (1986)

Supreme Court of Oregon

LINDE, Justice. When Janet Cooper, a special education teacher in the Eugene public schools, became a Sikh, she donned white clothes and a white turban and wore them while teaching her sixth and eighth grade classes. In a letter to the staff of the school where she taught, she wrote that she would wear the turban and often wear white clothing as part of her religious practice, and that she had explained this and other changes in her life to her students." She continued to wear her white garb after being warned that she faced suspension if she violated a law against wearing religious dress at her work. The law provides,...:

> No teacher in any public school shall wear any religious dress while engaged in the performance of duties as a teacher....

and...

> Any teacher violating the provisions [of this law] shall be suspended from employment by the district school board. The board shall report its action to the Superintendent of Public Instruction who shall revoke the teacher's teaching certificate.

Pursuant to these statutes, the school superintendent, acting for the school board, suspended Cooper from teaching and reported this action to the Superintendent of Public Instruction, who, after a hearing revoked Cooper's teaching certificate. This order was challenged on constitutional grounds in the Court of Appeals, which set aside the revocation of the teaching certificate as an excessive sanction under the court's understanding of federal First Amendment doctrine....

...The law singles out a teacher's religious dress because it is religious and to the extent that its religious significance is apparent when the wearer is engaged in teaching. The issue therefore is whether the law infringes the right guaranteed to "all men" by Article I, section 2, of the Oregon Constitution "to worship Almighty God according to the dictates of their own consciences," or "control[s] the free exercise, and enjoyment of religious opinions, or interfere[s] with the right of conscience" contrary to Article I, section 3.....

This court in fact has interpreted the meaning of these guarantees independently, sometimes with results contrary to those reached by the United States Supreme Court....

The religion clauses of Oregon's Bill of Rights...are specifications of a larger vision of freedom for a diversity of religious beliefs and modes of worship and freedom from state-support official faiths or modes of worship....

...There is no reason to believe that when the Legislative Assembly enacted [this law] in its present form in 1965, it had any aim other than to maintain the religious neutrality of the public schools, to avoid giving children or their parents the impression that the school, through its teachers, approves and shares the religious commitment of one group and perhaps finds that of others less worthy...

Recognition that freedom of religion for all implies official sponsorship of none has grown with the growing diversity of the nation itself. Two hundred years ago religious toleration could mean toleration merely among Protestant denominations.... From the "Know-Nothing" nativism of the mid-19th century, through the battle over the "Blaine Amendment," to recent times, contention centered on the role of Catholicism in public schools, symbolized by the dress of priests and nuns, as distinct from mainstream Protestantism, represented by school prayers and the King James translation of the Bible....It may be a far cry from these historic conflicts to perceive any threat of sectarian influence in the dress of a sect that, in this country, may seem an exotic curiosity. But we are examining the validity of the law against a charge that it denies teachers the freedom to adopt the dress of their respective religions. Neither their religious freedom nor that of their students can depend on calculations which faiths are more likely than others to snatch a young soul from a rival creed. The tides of immigration and of homegrown religions have changed before and are changing again, and what is exotic today may tomorrow gain many thousands of adherents and potential majority status in some communities....

We conclude that [this law] does not impose an impermissible requirement for teaching in the public schools if it is properly limited to actual incompatibility with the teaching function.

...Compliance with the statute demands some sacrifice of religious self-expression by the teacher. The statute, of course, does not forbid the wearing of religious dress outright, but it does forbid doing so while teaching....The religious influence on children while in the public school that laws like [this law]...legitimately seek to prevent is not the mere knowledge that a teacher is an adherent of a particular religion. Their concern is that the teacher's appearance in religious garb may leave a conscious or unconscious impression among young people and their parents that the school endorses the particular religious commitment of the person whom it has assigned the public role of teacher....The statute therefore would not be violated whenever a teacher makes an occasional appearance in religious dress, for instance on her way to or from a seasonal ceremony....Only wearing religious dress as a regular or frequently repeated practice while teaching is grounds for disqualification.

We conclude that, when correctly interpreted and applied, [this law] survives challenge under Oregon's guarantees of religious freedom. As interpreted in this opinion, we believe it also does not violate the federal First Amendment....

...[Revocation of the teacher's certificate] is not a withdrawal of a privilege by reason of hostility to a religious or political belief....It is disqualification from teaching in public schools based on one's doing so in a manner incompatible with that function....

The decision of the Court of Appeals is reversed.

A BOARD MEMBER'S BIAS AT A HEARING DEPRIVES A TEACHER OF DUE PROCESS.

Crump v. Board of Education
of the Hickory Administrative School Unit
392 SE 2d 579 (1990)

Supreme Court of North Carolina

MITCHELL, Justice. The issue before us is whether, at a teacher dismissal hearing, a single school board member's bias against the teacher taints the entire board's decision-making process, denying the teacher due process and entitling him to compensatory damages, regardless of whether the bias affected the correctness of the board's decision. We conclude that such bias makes the decision-making process inherently unfair and violates due process.

...On 7 June 1984, the defendant-appellants, the Hickory Board of Education and its individual members, dismissed the plaintiff-appellee, Eddie Ray Crump, from his teaching position at Hickory High School based on findings of immorality and insubordination....

Bruce Crump (no relation to the plaintiff-appellee), another former teacher, testified that in the spring of 1984, prior to the Board's hearing, he witnessed Board member Lois Young tell Principal Williamson, "We're all together on this Crump thing." Bruce Crump also testified that no matters involving him were pending with the Board at the time he heard Young make the statement about the "Crump thing." Neither Young nor Williamson testified at trial.

The plaintiff-appellee Eddie Crump testified that he had a conversation with Board member Young after his dismissal. Crump testified that during their conversation, Young told him that prior to the Board's hearing, Principal Williamson had promised the Board members that Crump would resign rather than endure a dismissal hearing and thus bring embarrassment upon his wife.

The jury found that the Board had failed to "provide [Crump] a fair hearing before an unbiased hearing body," and that Crump had suffered resulting actual damages..., and awarded no punitive damages. The trial court entered judgment accordingly. A divided panel of the Court of Appeals affirmed the trial court's judgment....

The Court of Appeals concluded that in this separate civil action under section 1983, the trial court "correctly instructed the jury that the bias of one member of the Board was sufficient for the jury to find that Mr. Crump had been deprived of a fair hearing."...For the reasons discussed below, we too find no error in the trial court's instructions and affirm the decision of the Court of Appeals. We begin our analysis with some foundational concepts concerning due process, bias, and school boards.

Whenever a government tribunal, be it a court of law or a school board, considers a case in which it may deprive a person of life, liberty or property, it is fundamental to the concept of due process that the deliberative body give that person's case fair and open-minded consideration. "A fair trial in a fair tribunal is a basic requirement of due process."...As a career teacher..., Crump had a cognizable property interest in his continued employment...Roth....Further, Crump's constitutionally-protected liberty interest was implicated, [and] Crump was entitled to a hearing according with principles of due process....We recognize that due process is a somewhat fluid concept, and that determining what process is "due" at a school board hearing is very different from evaluating the procedural protections required in a court of law. "Determining what process is due in a given setting requires the Court to take into account the individual's stake in the decision at issue as well as the State's interest in a particular procedure for making it."...

An unbiased, impartial decision-maker is essential to due process....As discussed below, this case turns on the question of what evidence will suffice to support a jury's determination, as here, that a decision-maker is biased, when the decision-maker is a group of persons.

While the word "bias" has many connotations in general usage, the word has few specific denotations in legal terminology. Bias has been defined as "a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction," Black's Law Dictionary... or as "a sort of emotion constituting untrustworthy partiality,." ...Bias can refer to preconceptions about facts, policy or law; a person, group or object; or a personal interest in the outcome of some determination. Crump's complaint commending the civil action now before us on appeal alleged that one or more Board members came into his hearing having already decided to vote against him, based on "factual" information obtained outside the hearing process. This type bias can be labeled a "prejudgment of adjudicative facts."

...If a Board member had made a fixed decision, prior to the Board's hearing, to vote against Crump, that member was biased against him. One such Board member's participation in Crump's dismissal hearing would cause that hearing to deny Crump procedural due process, no matter what outcome the Board reached at the hearing.

Distinguishing a Board member's disqualifying bias against Crump from permissible pre-hearing knowledge about Crumb's case is essential to our analysis. Members of a school board are expected to be knowledgeable about school-related activities in their district. Board members will sometimes have discussed certain issues that later become the subject of board deliberations; such knowledge and discussions are inevitable aspects of their multifaceted roles as administrators, investigators and adjudicators. However, when performing their quasi-judicial function during a board hearing and any resulting deliberations, members must be able to set aside their prior knowledge and preconceptions concerning the matter at issue, and base their considerations solely upon the evidence adduced at the hearing. In an analogous case before the United States Court of Appeals for the Ninth Circuit, Judge (now Justice) Anthony Kennedy wrote:

> The key component of due process, when a decisionmaker is acquainted with the facts, is the assurance of a central fairness at the hearing....
> ...Members of a school board in smaller communities may well have some knowledge of the facts and individuals involved in incidents which they must evaluate. Their obligation is to act impartially and in a fair manner....

In the present case, a Board member with pre-hearing knowledge regarding the allegations against Crump would neither necessarily nor presumptively be biased again him. "The mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of the Board members at a later adversary hearing."...Indeed, because of their multifaceted roles as administrators, investigators, and adjudicators, school boards are vested with a presumption that their actions are correct, and the burden is on a contestant to prove otherwise....

If the Board in this case was biased, it was unable to provide Crump with the fair and open-minded consideration that due process demanded his case receive....Here, there was substantial evidence that, at the Board's hearing, one or more Board members consciously concealed both prior knowledge of the allegations against Crump and a fixed predisposition against him. Such evidence having been presented, the trial court properly submitted this case to the jury for its determination as to whether a Board member had in fact been biased against Crump.

The decision of our Court of Appeals is in accord with the view of the United States Court of Appeals for the Third Circuit, which has stated that "[l]itigants are entitled to an impartial tribunal whether it consists of one...or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."...

The Board argues that at worst the evidence only shows that one member of the body making the adjudication was not in a position to judge impartially. We deem this answer insufficient.

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Litigants are entitled to an impartial tribunal...

A critical component of any quasi-judicial hearing and decision-making by a deliberative body is the give and take which occurs when group members share their observations and opinions. There is a fundamental notion that each member will enter the hearing with an open mind, listen to and view the evidence, share his or her observations, analyses and opinions with the other members' comments, and only then finally commit to a vote. One biased member can skew the entire process by what he or she does, or does not do, during the hearing and deliberations. Since the Board's deliberations giving rise to this case were closed and unrecorded, there is no meaningful way to accurately review the process to determine the impact of any bias by one or more members during the hearing and deliberations....

...Having established injury arising from the due process violation itself to a Catawba County jury's satisfaction, Crump was entitled to a verdict in his favor.

Bias is hard to prove. Given the level of pre-commitment by a board member that must be shown to make out a case of bias and a resulting denial of due process, we doubt that our decision in this case will open any floodgates of litigation or unduly prevent boards of education from dismissing bad teachers....

...[T]he decision of the Court of Appeals affirming the judgment of the trial court is affirmed....

RIGHT OF PRIVACY IS NOT VIOLATED IF THE PRINCIPAL IS REQUIRED BY THE SCHOOL BOARD TO SEE A PSYCHIATRIST.

Daury v. Smith
842 F 2d 9 (1988)

United States Court of Appeals, First Circuit

BOWNES, Circuit Judge. Plaintiff-appellant Jeffrey Daury appeals the grant of summary judgment in favor of defendants-appellees in his action for deprivation of constitutional rights....Daury, a "grade leader" in the Pittsfield, Massachusetts, school system, alleged in three counts of his complaint that the defendants, by requiring him to consult a psychiatrist as a condition of continued employment, deprived him of his right to privacy as guaranteed by the ninth and fourteenth amendments and his right to liberty as guaranteed by the fourteenth amendment. Daury claimed that as a result of defendants' action he suffered emotional distress, mental anguish, and damage to his health and well-being. Daury further claims that the decision to require him to see a psychiatrist was made in retaliation for his "union activities and free speech" and constituted intentional infliction of emotional distress....

Jeffrey Daury began work for the Pittsfield school system in 1970 as a school principal. Two general aspects of his tenure are relevant to this appeal. First, Daury's favorable work evaluations began to decline in 1979 because defendants received an above average number of complaints concerning Daury from parents. Daury admits that some complaints did issue, but denies the foundation for many of them. Second, from 1979 until some time in 1983, Daury was a member of the negotiating team for the Pittsfield Teacher's Association. Daury asserts that he was very vocal in this role, but concedes that nothing unusual--neither strikes nor picketing---occurred during any period of contract negotiations.

In May 1983, the school committee decided to close one of the schools in the district because of budgetary constraints. It, therefore, became necessary to demote one principal; the committee decided upon Daury, and he was demoted to his present position of grade leader. Daury initiated a grievance procedure, but subsequently abandoned it. The committee has averred that its decision was in strict accordance with the requirement under the collective bargaining agreement that it consider both seniority and performance in deciding upon the demotion of a school principal.

Defendants point to three incidents, as well as other matters, leading to their decision to require that Daury see a psychiatrist. The first incident took place in October 1982. During a meeting about school funds between Daury and Theodore Herberg, director of research for the Pittsfield schools, Daury brought up a personal matter. The conversation turned into a near physical altercation; Daury received a written reprimand from Superintendent Davis. Daury filed a grievance and an arbitrator upheld the reprimand.

The second incident occurred in November 1982. Daury discovered documents in his personnel file that he had not signed. This was contrary to the collective bargaining agreement, which required that any document placed in a teacher's personnel file must be first signed by the teacher. Later that same day, Daury encountered Davis and another school administrator in the school parking lot. An argument concerning the unsigned documents ensured, as a result of which Davis suspended Daury for three days without pay. Again Daury filed a grievance. The arbitrator reduced the suspension to one day, and ordered the documents removed from Daury's file.

The final incident which prompted the school committee to require that Daury see a psychiatrist took place on June 3, 1983. Daury was supervising students crossing the street when a boy (not, as it developed, a student at Daury's school) began to cross in an unsafe manner. Daury told the boy to stop, and the boy swore at him. Daury took hold of him. According to Daury, he held the boy's arm. Defendants were told that Daury grabbed the boy by the neck. A police officer intervened and the boy was released. The boy's parents initiated a criminal complaint against Daury for assault and battery. Two witnesses, including the police officer, testified at trial that Daury put a "stranglehold" on the boy. One of these witnesses, a woman who allegedly viewed the entire incident, had telephoned Davis reporting the incident soon after it happened. Daury was found not guilty and the presiding judge praised his behavior as responsible.

Prior to the criminal trial Daury and his attorney met in Davis' office with a representative of the Massachusetts Teachers Association (MTA), Assistant Superintendent Bordeau, and Superintendent Davis. Both Bordeau and Davis assert that Daury stated at the meeting that he was under a great deal of pressure and that he thought he needed some tranquilizers. It was tentatively agreed that Daury would be put on a leave of absence with pay until the end of the school year--that is, until the end of June 1983.

The school committee formally approved the paid leave at a meeting held that same evening. In addition, the committee decided that Daury be required to see a psychiatrist before returning to work....

On August 7, 1984, Daury filed suit against the defendants.

Daury alleges that the school committee's order that he see a psychiatrist violated his constitutional right to privacy. More specifically, he maintains that compelling him to submit to a psychiatric examination as condition to his continued employment forced him to reveal information about his marriage, family history, and other personal relationships, and that this constituted an invasion of privacy regardless of the promise given by the school committee to keep the report confidential.

That a person has a constitutional right to privacy is now well established....Such right includes "the individual interest in avoiding disclosure of personal matters...."...The privacy right, however, must often give way to considerations of public interest....

...[T]here is a legitimate public interest in providing a safe and healthy educational environment. A school committee, therefore, may justifiably compel a teacher or administrator to submit to a psychiatric examination as a condition of continued employment if the committee has reason to believe that the teacher or administrator may be jeopardizing the welfare of students under his or her supervision.

Viewing the evidence in the light most favorable to Daury, we find no violation of his constitutional right in the committee's requiring that Daury see a psychiatrist. The committee simply sought a professional opinion to insure that Daury would not, if he returned to work, jeopardize the school system's interest in providing a safe and healthy educational environment.....And Daury offered no specific evidence contradicting the committee's position that it had a reasonable basis for concern.

...In light of all of the information the school committee had--the June 3 incident, Daury's statement that he was under pressure and needed tranquilizers, the two incidents in which he precipitated physical confrontations, and the complaints by parents,--we think it was eminently reasonable for the school committee to require that Daury submit to a psychiatric examination....

Plaintiff's complaint does not contain any count stating that defendants, in requiring him to submit to a psychiatric examination, did so in retaliation for plaintiff's union activities and exercise of his right to free speech....

Affirmed.

CENSORSHIP OF A STUDENT'S R-RATED FILM REVIEWS BY SCHOOL ADMINISTRATORS WITHOUT A LEGITIMATE EDUCATIONAL POLICY TO GOVERN SCHOOL PUBLICATIONS VIOLATES THE STUDENT'S FIRST AMENDMENT RIGHTS.

Desilets v. Clearview Regional Board of Education
647 A 2d 150 (1994)

Supreme Court of New Jersey

PER CURIAM.

The mother of a junior high school student brought this action against a school board and the school's superintendent and principal challenging their refusal to publish in the student newspaper her son's movie reviews of R-rated films. She contended that the action taken by the school authorities violated her son's freedom of expression under the state and federal constitutions. The school authorities assert that they did not violate the student's right to free expression because the decision to withhold publication of the movie reviews was based on valid educational policy.

The trial court ruled that the school principal's decision to delete the pupil's movie reviews from the school newspaper did not violate his expressional rights under the First Amendment of the Federal Constitution because such action was reasonably related to legitimate pedagogical concerns, as required by the United States Supreme Court in Hazelwood School District v. Kuhlmeier....

The Appellate Division, with a dissent, affirmed the judgment of the trial court....The Appellate Division majority reasoned that the school authorities had violated the student's First Amendment rights, not the State Constitution, because under Hazelwood, no legitimate pedagogical reasons justified the censorship of the R-rated movie reviews....

We now affirm the judgment of the Appellate Division....

In Hazelwood, the United States Supreme Court determined that a school principal's censorship of student-written articles for the student newspaper was not violative of the First Amendment because the decision of the school authorities was reasonably related to legitimate pedagogical concerns....

The Supreme Court rejected the students' claims that the student newspaper was a public form. The Court rules that "public schools may be deemed to be public forums only if school authorities have 'by policy or practice' opened those facilities 'for indiscriminate use by the general public' or by some segment of the public, such as student organizations."...Perry Educ. Ass'n

v. Perry Local Educ. Ass'n... "If the facilities have instead been reserved for other intended purposes," then the forum is not a public one, and the school "may impose reasonable restrictions on the speech of students, teachers, and other members of the school community....The Supreme Court concluded that the newspaper was not a public forum because the student newspaper was part of the school curriculum, a faculty member taught the newspaper course during regular school hours, and the students received grades and academic credit for participating on the newspaper....

The Appellate Division was soundly guided on this issue by the Supreme Court. It ruled that the student newspaper, Pioneer Press, is not a public forum....Concededly, students participating in the Pioneer Press, unlike those in Hazelwood, did not receive grades or academic credit for their participation in the newspaper....Nor has the publication part of a regular classroom assignment....However, the publication was supervised by a designated faculty member. Moreover, as the Appellate Division noted, "students, parents and members of the public might reasonably perceive [school-sponsored publications] to bear the imprimatur of the school,...whether or not [such activities] occur in the traditional classroom setting, as long as [those activities] are supervised by faculty members and [are] designed to impart knowledge or skills to the student participants and their audiences."...

We therefore agree with the determination of the Appellate Division that the Pioneer Press is not a public form....

...[S]peech occurring in a non-public forum, as in Hazelwood, may be subject to reasonable restrictions. With respect to a school publication, it ruled in Hazelwood that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."...

We agree with the Appellate Division that the R-rated movie reviews in this case do not appear to raise educational concerns that call for the kinds of editorial control exemplified by the Supreme Court in Hazelwood. The reviews contained brief descriptions of two movies [Mississippi Burning and Rain Man] with terse recommendation[s]....

[T]he Appellate Division found that the "pedagogical interests' considered by the Hazelwood Court as sufficient to justify a restriction on speech did not extend beyond the "style and content" of the materials. Further, it narrowly interpreted "content" as used by the Supreme Court in Hazelwood to apply only or essentially to the language of the communication.

We do not share the certainty of the Appellate Division that

Hazelwood provides or turns on such a distinction between subject-matter on the one hand and style and content on the other. The facts of Hazelwood do not suggest that distinction. The Supreme Court there found that the students' commentary on their sexual histories, specifically their use or nonuse of birth control, could be reasonably determined to be inappropriate for the school newspaper....If the Supreme Court, in expressing its concerns with "content and journalistic style," was focusing essentially on the language used or the form of expression, and not the subject-matter of the communication, then the non-graphic and neutral nature of the language used to describe the pregnant girls' stories would have inferentially been given more prominence in the Court's analysis and possibly have brought the Court to a different conclusion....

We are satisfied that the evidence in this case concerning the school's educational policy was, at best, equivocal and inconsistent. The school board's position with respect to the policy that applied to student publications, specifically as related to matters such as movie reviews, was vague and highly conclusory. It conceded that it had no specific policy regarding movie reviews of R-rated films; nevertheless, it argued that the action taken by the principal and superintendent complied with that "policy."...Further, how any "policy" was applied to the student's R-rated movie reviews remains unclear. The school authorities assert that the publication of Brien's R-rated movie reviews violated its official policy because those reviews constituted "material which advocated the use or advertised the availability of any substance believed to constitute a danger to student health."...However, no one explained how such R-rated movie reviews posed a danger to student health. Moveover, if such R-rated movie reviews did violate that policy, the evidence strongly suggests that the policy was often ignored or applied inconsistently because R-rated movies were discussed in class, referred to and available in the school library, and, in fact, reviewed and published by the student newspaper....

The foregoing does not mean that the school had no legitimate pedagogical concerns over the publication of articles dealing with R-rated movies or, indeed, did not in fact have an educational policy dealing with that subject. Rather, the record suggests only that such a policy, if it exists, is vaguely defined and loosely applied and that its underlying educational concerns remained essentially undefined and speculative.

In sum, we agree with the Appellate Division that under Hazelwood, defendants failed to establish a legitimate educational policy that would govern the publication of the challenged materials and, as a consequence, the school authorities, under these circumstances, did violate the student's expressional rights under the First Amendment....

A SCHOOL SYSTEM'S INSURANCE POLICY HAS AN IMPACT ON WHETHER SOVEREIGN IMMUNITY IS WAIVED.

Dugger v. Sprouse
394 SE 2d 275 (1988)

Supreme Court of Georgia

SMITH, Justice. Appellee Anthony Plavich is an employee of Murray County school system. A suit was filed by a student, appellant Darin Dugger, for injuries he received when he was thrown from the back of a pickup truck while delivering wrestling mats from one county school to another. The appellee's motion for summary judgment, based upon the defense of sovereign immunity, was granted. We affirm.

If insurance coverage is obtained by a government entity, then the government entity [the school system] waives its sovereign immunity to the extent of such insurance coverage....However, where the plain terms of the policy provide that there is no coverage for the particular claim, the policy does not create a waiver of sovereign immunity as to that claim. Here the trial court found that the policy did not provide coverage for the appellant's claim. Where there is no insurance coverage, there is no waiver of sovereign immunity.

Judgment affirmed.

All the Justices concur.

A STATE REQUIREMENT OF BALANCED TREATMENT OF CREATIONISM AND EVOLUTION VIOLATES THE FIRST AMENDMENT.

Edwards v. Aguillard
107 SCt 2573 (1987)

Supreme Court of the United States

JUSTICE BRENNAN delivered the opinion of the Court. The question for decision is whether Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" Act...is facially invalid as violative of the Establishment Clause of the First Amendment.

The Creationism Act forbids the teaching of the theory of evolution in public schools unless accompanied by instruction in "creation science."...No school is required to teach evolution or creation science. If either is taught, however, the other must also be taught. The theories of evolution and creation science are statutorily defined as "the scientific evidences for [creation or evolution] and inferences from those scientific evidences."...

It is clear from the legislative history that the purpose of the legislative sponsor, Senator Bill Keith, was to narrow the science curriculum. During the legislative hearings, Senator Keith stated: "My preference would be that neither [creationism nor evolution] be taught." Such a ban on teaching does not promote--indeed, it undermines--the provision of a comprehensive scientific education.

It is equally clear that requiring schools to teach creation science with evolution does not advance academic freedom. The Act does not grant teachers a flexibility that they did not always possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life. Indeed, the Court of Appeals found that no law prohibited Louisiana public schoolteachers from teaching any scientific theory....As the president of the Louisiana Science Teachers Association testified, "[a]ny scientific concept that's based on established fact can be included in our curriculum already, and no legislation allowing this is necessary." The Act provides Louisiana schoolteachers with no new authority. Thus the stated purpose is not furthered by it....

Furthermore, the goal of basic "fairness" is hardly furthered by the Act's discriminatory preference for the teaching of creation science and against the teaching of evolution. While requiring that curriculum guides be developed for creation science, the Act says nothing of comparable guides for evolution....Similarly, research services are supplied for creation science but not for evolution. Only "creation scientists" can serve on the panel that supplies the resource services. The Act forbids school boards to discriminate against anyone who "chooses to be a creation-scientist" or to teach "creationism," but fails to protect those who choose to teach evolution or any other non-creation science theory, or who refuses to teach creation science....

If the Louisiana legislature's purpose was solely to maximize the comprehensiveness and effectiveness of science instruction, it would have encouraged the teaching of all scientific theories about the origins of humankind. But under the Act's requirements, teachers who were once free to teach any and all facets of this subject are now unable to do so. Moreover, the Act fails even to ensure that creation science will be taught, but instead requires the teaching of this theory only when the theory of evolution is taught. Thus we agree with the Court of Appeals' conclusion that the Act does not serve to protect academic freedom, but has the distinctly different purpose of discrediting "evolution by counterbalancing its teaching at every turn with the teaching of creation science...."

...There is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution. It was this link that concerned the Court in Epperson v. Arkansas...which also involved a facial challenge to a statute regulating the teaching of evolution....Although the Arkansas anti-evolution law did not explicitly state its predominant religious purpose, the Court could not ignore that "[t]he statute was a product of the upsurge of 'fundamentalist' religious fervor" that has long viewed this particular scientific theory as contradicting the literal interpretation of the Bible....The Court found that there can be no legitimate state interest in protecting particular religions from scientific views "distasteful to them," and concluded "that the first Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."...

These same historic and contemporaneous antagonisms between the teachings of certain religious denominations and the teaching of evolution are present in this case. The preeminent purpose of the Louisiana legislature was clearly to advance the religious viewpoint that a supernatural being created humankind. The term "creation science" was defined as embracing this particular religious doctrine by those responsible for the passage of the Creationism Act. Senator Keith's leading expert on creation science, Edward Boudreaux, testified at the legislative hearings that the theory of creation science included belief in the existence of a supernatural creator....Senator Keith also cited testimony from other experts to support the creation science view that "a creator [was] responsible for the universe and everything in it." The legislative history therefore reveals that the term "creation science," as contemplated by the legislature that adopted this Act, embodies the religious belief that the supernatural creator was responsible for the creation of humankind.

Furthermore, it is not happenstance that the legislature required the teaching of a theory that coincided with this religious view. The legislative history documents that the Act's primary purpose was to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety....The legislation therefore sought to alter the science curriculum to reflect endorsement of a religious view that is antagonistic to the theory of evolution.

In this case, the purpose of the Creationism Act was to restructure the science curriculum to conform with a particular religious viewpoint. Out of many possible science subjects taught in the public schools, the legislature chose to affect the teaching of the one scientific theory that historically has been opposed by certain religious sects. As in Epperson, the legislature passed the Act to give preference to those religious groups which have as one of their tenets the creation of humankind by a divine creator....Because the primary purpose of the Creationism Act is to advance a particular religious belief, the Act endorses religion in violation of the First Amendment.

We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught....But because the primary purpose of the Creationism Act is to endorse a particular religious doctrine, the Act furthers religion in violation of the Establishment Clause....

The Louisiana Creationism Act advances a religious doctrine by requiring either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety. The Act violates the Establishment Clause of the First Amendment because it seeks to employ the symbolic and financial support of government to achieve a religious purpose. The judgment of the Court of Appeals therefore is affirmed.

CONTRACT RENEWAL MAY BE DEPENDENT UPON THE TEACHER OBTAINING NECESSARY CREDIT HOURS DURING A SPECIFIED PERIOD WHEN THIS REQUIREMENT IS A PART OF THE NEGOTIATED AGREEMENT.

Feldhusen v. Beach Public School District No. 3
423 NW 2d 155 (1988)

Supreme Court of North Dakota

VANDE WALLE, Justice. David Feldhusen appealed from a judgment dismissing his petition for a writ of mandamus. We affirm.

Feldhusen was employed by Beach Public School District No. 3 (Beach) as a teacher in the fall of 1981. His employment continued until his contract was nonrenewed in the spring of 1987.

Beach takes part in a voluntary "accreditation " program established by the State Department of Public Instruction. In order to be accredited a school district must establish and implement a policy for the professional growth of teachers. Beach implemented its policy through the following provision in its professional-negotiations agreement with the teachers in the school district....

--b. Teachers with degrees must acquire 8 semester or 12 quarter hours every five years....

--e. All teachers must provide written proof each year by the second Monday in September that they meet above accreditation standards as required by North Dakota Department of Public Instruction. No salary increase will be granted the year accreditation standards are not met and no teacher contract will be offered the following year unless accreditation standards are met....

Beach established this policy in 1981. The 1985-1986 school year was the fifth year of the cycle for Feldhusen. At the end of that school year Feldhusen had completed only six of the requisite twelve quarter-hours.

In March of 1987 the Beach school board voted to contemplate nonrenewal of Feldhusen's teaching contract. A letter was sent to Feldhusen informing him of the contemplated nonrenewal for the reason of "teacher qualifications" based upon Feldhusen's failure to meet the accreditation standards....

After the end of the 1986-1987 school year Feldhusen performed coursework which would have given him the number of credits or quarter-hours required by the Beach accreditation policy. This work was completed in June of 1987. In July of 1987 Beach hired another teacher to fill the position which Feldhusen had held. Subsequently Feldhusen petitioned for a writ of mandamus requiring Beach to give him a contract. After a heading was held, the trial court issued a judgment dismissing the petition. It is from that judgment that Feldhusen appeals.

The question before us is whether the trial court erred in dismissing Feldhusen's petition for a writ of mandamus....

Feldhusen...argues that he has a clear legal right to a contract from Beach because there was no statutory basis for the Beach school board's nonrenewal decision. We disagree. The nonrenewal of teacher contracts is governed by Section 15-47-38(5), N.D.C.C. A portion of that statute provides:

> The reasons given by the board for not renewing a teacher's contract must be sufficient to justify the contemplated action of the board and may not be frivolous or arbitrary but must be related to the ability, competence, or qualifications of the teacher as a teacher, or the necessities of the district such as lack of funds calling for a reduction in the teaching staff.

Thus teachers' contracts can be nonrenewed for a lack of qualifications.

In this case Beach was voluntarily taking part in an accreditation program which required that it assure the professional growth of its teachers. In order to comply with the accreditation standards, Beach, in tandem with its teachers, created a policy requiring its teachers to acquire a certain number of college credits in a five-year period. That policy became a part of the professional-negotiations agreement between the Beach school board and the teachers of Beach. It is readily apparent that one of the qualifications for a teacher in Beach was that the teacher abide by the contractual provision designed to retain Beach's accreditation. If the teacher failed to abide by the provision regarding the acquisition of college credits, the negotiated policy specified that no teacher contract would be offered the following year, thus justifying nonrenewal under Section 15-47-38(5). Therefore, we cannot conclude that the trail court abused its discretion in denying the petition for a writ of mandamus which was predicated upon a claim that nonrenewal could not be grounded in a teacher's failure to abide by the Beach policy as formulated in the professional-negotiations agreement....

The judgment is affirmed.

DISMISSAL OF A TEACHER FOR USING AN "R-RATED," VIOLENT, SEXUALLY SUGGESTIVE, FILM HAVING NO PROPER EDUCATIONAL PURPOSE IS UPHELD.

Fowler v. Board of Education of Lincoln County, Kentucky
819 F 2d 657 (1987)

United States Court of Appeals, Sixth Circuit

MILBURN, Circuit Judge....Plaintiff Jacqueline Fowler was a tenured teacher employed by the Lincoln County, Kentucky, school system for fourteen years. She was discharged in July, 1984, for insubordination and conduct unbecoming a teacher. The basis for this action was that she had an "R" rated movie, Pink Floyd--The Wall, shown to her high school students on the last day of the 1983-84 school year. The students in Fowler's classes were in grades nine through eleven and were of the ages fourteen through seventeen.

The day on which the movie was shown, May 31, 1984, was a noninstructional day used by teachers for completing grade cards. A group of students requested that Fowler allow the movie to be shown while she was completing the grade cards. Fowler was unfamiliar with the movie and asked the students whether it was appropriate for viewing at school. Charles Bailey, age fifteen, who had seen the movie on prior occasions, indicated that the movie had "one bad place in it."...

When Fowler had the movie shown on the morning of May 31, 1984, she instructed Charles Bailey, the fifteen-year-old student who had seen the movie, to edit out any parts that were unsuitable for viewing at school. He did so by attempting to cover the 25" screen with an 8 1/2" to 11" letter-sized file folder....

There is conflicting testimony as to whether, or how much, nudity was seen by the students. At the administrative hearing, several students testified that they saw no nudity....One student testified that she saw "glimpses" of nudity, but "nothing really offending."...

There is also conflicting testimony regarding the amount of sexual innuendo existing in the "unedited" version of the film. Because some parts of the film are animated, they are susceptible to varying interpretations. One particularly controversial segment of scenes is animated in which flowers appear on the screen, are transformed into the shape of male and female sex organs and then engage in an act of intercourse....

Once again, there is conflicting testimony concerning the effectiveness of the editing attempt....

In addition to the sexual aspects of the movie, there is a great deal of violence. One scene involves a bloody battlefield ....Another scene shows children being fed into a giant sausage machine....

On the afternoon of May 31, 1984, Principal Jack Portwood asked Fowler to give him the video tape, and she did so. After the movie was viewed by the superintendent and members of the Lincoln County Board of Education, proceedings were instituted to terminate Fowler's contract.

Plaintiff Fowler received her termination notice on or about June 19, 1984. The notice advised her that a hearing would be held on July 10, 1984, and she subsequently advised the board of her intention to appear at the hearing and contest the charges.

On July 10, 1984, plaintiff Fowler appeared with counsel at the administrative hearing. She testified that, despite the fact that she had never seen the movie before having it shown to her students, and despite the fact that she was posting grades on report cards and left the room several times while the movie was being shown, she believed it had significant value. She believed the movie portrayed the dangers of alienation between people and of repressive educational systems. She testified that she would show an edited version of the movie again if given the opportunity to explain it. She stated that she did not at any time discuss the movie with her students because she did not have enough time.

[T]he board...voted unanimously to terminate plaintiff's employment for insubordination and conduct unbecoming a teacher....

The district court concluded that Fowler's conduct was protected by the First Amendment, and that she was discharged for exercising her constitutionally protected rights....

In the present case the district court concluded that Mrs. Fowler was entitled to the protection of the First Amendment *while acting as a teacher*. That a teacher does have First Amendment protection under certain circumstances cannot be denied....Likewise, a motion picture is a form of expression which may be entitled to the protection of the First Amendment. ...

However, I conclude that Fowler's conduct in having the movie shown under the circumstances present here did not constitute expression protected by the First Amendment. It is undisputed that Fowler was discharged for the showing of the movie, *Pink Floyd--The Wall*. Such conduct, under the circumstances involved, clearly is not "speech" in the traditional sense of the expression of ideas through use of the spoken or written word....[N]ot every form of conduct is protected by the First Amendment right of free speech....

> If any sort of conduct that people wish to engage in is to be considered "speech" simply because those who engage in conduct are, in one sense, necessarily expressing their approval of it, the line between "speech" protected by the First Amendment and conduct not so protected will be destroyed....

Moreover, the surrounding circumstances in the present case indicate that there was little likelihood "that the message would be understood by those who viewed it."...As we have noted, the "R" rated movie was shown on a noninstructional day to students in Fowler's classes in grades nine through eleven who were of ages ranging from fourteen through seventeen. Furthermore, Fowler never at any time made an attempt to explain any message that the students might derive from viewing the movie....

[C]onduct is protected by the First Amendment only when it is expressive or communicative in nature. In the present case, because plaintiff's conduct in having the movie shown cannot be considered expressive or communicative, under the circumstances present, the protection of the First Amendment is not implicated. ...

Plaintiff argues that..."Conduct unbecoming a teacher," is unconstitutionally vague as applied to her because the statute failed to give notice that her conduct would result in discipline. We find this argument to be without merit....

In the present case, plaintiff Fowler had a fifteen-year-old student show a controversial, highly suggestive and somewhat sexually explicit movie to a group of high school students aged fourteen to seventeen. She did not preview the movie, despite the fact that she had been warned that portions were unsuitable for viewing in this context. She made no attempt at any time to explain the meaning of the movie or to use it as an educational tool. Rather, she had it shown for the purpose of keeping her students occupied during a noninstructional day while she was involved in posting grades on report cards. We conclude that the statute proscribing "conduct unbecoming a teacher" gave her adequate notice that such conduct would subject her to discipline. Accordingly, we conclude that the statute is not unconstitutionally vague as applied to Fowler's conduct....

In the present case, we conclude that plaintiff's conduct, although not illegal, constituted serious misconduct. Moreover, there was a direct connection between this misconduct and Fowler's work as a teacher. She introduced a controversial and sexually explicit movie into a classroom of adolescents without preview, preparation or discussion. In this process, she abdicated her function as an educator. Her having the movie shown under the circumstances involved demonstrates a blatant lack of judgment. Having considered the entire record, including the viewing of the movie, which we describe as gross and bizarre and containing material completely unsuitable for viewing by a classroom of students aged fourteen to seventeen, we conclude that such conduct falls within the concept of conduct unbecoming a teacher under Kentucky law.

Accordingly, for the reasons stated, the judgment of the district court is vacated, and this cause is dismissed.

FEDERAL COURTS MAY INCREMENTALLY RELINQUISH SUPERVISION OF ASPECTS OF DESEGREGATION PLANS WHEN THEY FEEL MAJOR CONCERNS HAVE BEEN MET.

Freeman v. Pitts
112 SCt 1430 (1992)

Supreme Court of the United States

JUSTICE KENNEDY delivered the opinion of the Court.

DeKalb County, Georgia, is a major suburban area of Atlanta. This case involves a court-ordered desegregation decree for the DeKalb County School System (DCSS). DCSS now serves some 73,000 students in kindergarten through high school and is the 32nd largest elementary and secondary school system in the Nation.

DCSS has been subject to the supervision and jurisdiction of the United States District Court for the Northern District of Georgia since 1969, when it was ordered to dismantle its dual school system. In 1986, petitioners filed a motion for final dismissal....We how [decide] that a district court is permitted to withdraw judicial supervision with respect to discrete categories in which the school district has achieved compliance with a court-ordered desegregation plan. A district court need not retain active control over every aspect of school administration until a school district has demonstrated unitary status in all facets of its system....

For decades before our decision in Brown v. Board of Education (Brown I) and our mandate in Brown v. Board of Education (Brown II), which ordered school districts to desegregate with "all deliberate speed," DCSS was segregated by law. DCSS's initial response to the mandate of Brown II was an all too familiar one. Interpreting "all deliberate speed" as giving latitude to delay steps to desegregate, DCSS took no positive action toward desegregation until the 1966-1967 school year, when it did nothing more than adopt a freedom of choice transfer plan. Some black students chose to attend former *de jure* white schools, but the plan had no significant effect on the former *de jure* black schools.

In 1968 we decided Green v. New Kent County School Bd. We held that adoption of a freedom of choice plan does not, by itself, satisfy a school district's mandatory responsibility to eliminate all vestiges of a dual system. Green was a turning point in our law in a further respect....We said that the obligation of school districts once segregated by law was to come forward with a plan that "promises realistically to work, and promises realistically to work *now*." The case before us requires an understanding and assessment of how DCSS responded to the directives set forth in Green.

Within two months of our ruling in Green, respondents, who are black school children and their parents, instituted this class action in the United States District Court for the Northern District of Georgia. After the suit was filed, DCSS voluntarily began working with the Department of Health, Education and Welfare to devise a comprehensive and final consent order approving the proposed plan, which was to be implemented in the 1969-1970 school year. The order abolished the freedom of choice plan and adopted a neighborhood school attendance plan that had been proposed by the DCSS and accepted by the Department of Health, Education and Welfare subject to a minor modification. Under the plan all of the former de jure black schools were closed and their students were reassigned among the remaining neighborhood schools. The District Court retained jurisdiction.

Between 1969 and 1986 respondents sought only infrequent and limited judicial intervention into the affairs of DCSS....

In 1986 petitioners filed a motion for final dismissal of the litigation. They sought a declaration that DCSS had satisfied its duty to eliminate the dual education system, that is to say a declaration that the school system had achieved unitary status. The District Court approached the question whether DCSS had achieved unitary status by asking whether DCSS was unitary with respect to each of the factors identified in Green. The court considered an additional factor that is not named in Green: the quality of education being offered to the white and black student populations.

The District Court found DCSS to be "an innovative school system that has travelled the often long road to unitary status almost of its end," noting that "the court has continually been impressed by the successes of the DCSS and its dedication to providing a quality education for all students within that system." It found that DCSS is a unitary system with regard to student assignment, transportation, physical facilities, and extracurricular activities, and ruled that it would order no further relief in those areas. The District Court stopped short of dismissing the case, however, because it found that DCSS was not unitary in every respect. The court said that vestiges of the dual system remain in the areas of teacher and principal assignments, resource allocation, and quality of education. DCSS was ordered to take measures to address the remaining problems....

Proper resolution of any desegregation case turns on a careful assessment of its facts. Here, as in most cases where the issue is the degree of compliance with a school desegregation decree, a critical beginning point is the degree of racial imbalance in the school district, that is to say a comparison of the proportion of majority to minority students in individual schools with the proportions of the races in the district as a whole. This inquiry is fundamental, for under the former de jure regimes racial exclusion was both the means and the end of a policy motivated by disparagement of or hostility towards the disfavored race. In accord with this principle, the District Court began its analysis with an assessment of the current racial mix in the schools throughout DCSS and the explanation for the racial imbalance it found....

In the extensive record that comprises this case, one fact predominates: remarkable changes in the racial composition of the county presented DCSS and the District Court with a student population in 1986 far different from the one they set out to integrate in 1969. Between 1950 and 1985, DeKalb County grew from 70,000 to 450,000 in total population, but most of the gross increase in student enrollment had occurred by 1969, the relevant starting date for our purposes. Although the public school population experienced only modest changes between 1969 and 1986 (remaining in the low 70,000's), a striking change occurred in the racial proportions of the student population. The school system that the District Court ordered desegregated in 1969 had 5.6% black students; by 1986 the percentage of black students was 47%....

The demographic changes that occurred during the course of the desegregation order are an essential foundation for the District Court's analysis of the current racial mix of DCSS. As the District Court observed, the demographic shifts have had "an immense effect on the racial compositions of the DeKalb County schools." From 1976 to 1986, enrollment in elementary schools declined overall by 15%, while black enrollment in elementary schools increased by 86%. During the same period, overall high school enrollment declined by 16%, while black enrollment in high school increased by 119%. These effects were even more pronounced in the southern portion of DeKalb County....

Respondents argued in the District Court that this racial imbalance in student assignment was a vestige of the dual system, rather than a product of independent demographic forces. In addition to the statistical evidence that the ratio of black students to white students in individual schools varied to a significant degree from the system-wide average, respondents contended that DCSS had not used all available desegregative tools in order to achieve racial balancing....

Although the District Court found that DCSS was desegregated for at least a short period under the court-ordered plan of 1969, it did not base its finding that DCSS had achieved unitary status with respect to student assignment on that circumstance alone. Recognizing that "[t]he achievement of unitary status in the area of student assignment cannot be hedged on the attainment of such status for a brief moment," the District Court examined the interaction between DCSS policy and demographic shifts in DeKalb County.

The District Court noted that DCSS had taken specific steps to combat the effects of demographics on the racial mix of the schools. Under the 1969 order, a biracial committee had reviewed all proposed changes in the boundary lines of school attendance zones. Since the original desegregation order, there had been about 170 such changes. It was found that only three had a partial segregative effect....

Having found no constitutional violation with respect to student assignment, the District Court next considered the other Green factors, beginning with faculty and staff assignments....

Addressing the more ineffable category of quality of education, the District Court rejected most of respondents' contentions that there was racial disparity in the provision of certain educational resources (e.g., teachers with advanced degrees, teachers with more experience, library books), contentions made to show that black students were not being given equal educational opportunity. The District Court went further, however, and examined the evidence concerning achievement of black students in DCSS. It cited expert testimony praising the overall educational program in the district, as well as objective evidence of black achievement....

Despite its finding that there was no intentional violation, the District Court found that DCSS had not achieved unitary status with respect to quality of education because teachers in schools with disproportionately high percentages of white students tended to be better educated and have more experience than their counterparts in schools with disproportionately high percentages of black students, and because per pupil expenditures in majority white schools exceeded per pupil expenditures in majority black schools. From these findings, the District Court ordered DCSS to equalize spending and remedy the other problems.

The final Green factors considered by the District Court were: (1) physical facilities, (2) transportation, and (3) extracurricular activities....

In accordance with its fact-finding, the District Court held that it would order no further relief in the areas of student assignment, transportation, physical facilities and extracurricular activities. The District Court, however, did order DCSS to establish a system to balance teacher and principal assignments and to equalize per pupil expenditures throughout DCSS. Having found that blacks were represented on the school board and throughout DCSS administration, the District Court abolished the biracial committee as no longer necessary....

Two principal questions are presented. The first is whether a district court may relinquish its supervision and control over those aspects of a school system in which there has been compliance with a desegregation decree if other aspects of the system remain in noncompliance. As we answer this question in the affirmative, the second question is whether the Court of Appeals erred in reversing the District Court's order providing for incremental withdrawal of supervision in all the circumstances of this case.

The duty and responsibility of a school district once segregated by law is to take all steps necessary to eliminate the vestiges of the unconstitutional de jure system. This is required in order to insure that the principal wrong of the de jure system, the injuries and stigma inflicted upon the race disfavored by the violation, is no longer present....

The concept of unitariness has been a helpful one in defining the scope of the district courts' authority, for it conveys the central idea that a school district that was once a dual system must be examined in all of its facets, both when a remedy is ordered and in the later phases of desegregation when the question is whether the district courts' remedial control ought to be modified, lessened, or withdrawn. But, as we explained last term in...Dowell, the term "unitary" is not a precise concept....

...A federal court in a school desegregation case has the discretion to order an incremental or partial withdrawal of its supervision and control. This discretion derives both from the constitutional authority which justified its intervention in the first instance and its ultimate objectives in formulating the decree. The authority of the court is invoked at the outset to remedy particular constitutional violations. In construing the remedial authority of the district courts, we have been guided by the principles that "judicial powers may be exercised only on the basis of a constitutional violation," and that "the nature of the violation determines the scope of the remedy." A remedy is justifiable only insofar as it advances the ultimate objective of alleviating the initial constitutional violation.

We have said that the court's end purpose must be to remedy the violation and in addition to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution....Partial relinquishment of judicial control, where justified by the facts of the case, can be an important and significant step in fulfilling the district court's duty to return the operations and control of schools to local authorities....

We hold that, in the course of supervising desegregation plans, federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations. While retaining jurisdiction over the case, the court may determine that it will not order further remedies in areas where the school district is in compliance with the decree. That is to say, upon a finding that a school system subject to a court-supervised desegregation plan is in compliance in some but not all areas, the court in appropriate cases may return control to the school system in those areas where compliance has been achieved, limiting further judicial supervision to operations that are not yet in full compliance with the court decree. In particular, the district court may determine that it will not order further remedies in the area of student assignment where racial imbalance is not traceable, in a proximate way, to constitutional violations.

A court's discretion to order the incremental withdrawal of its supervision in a school desegregation case must be exercised in a manner consistent with the purposes and objectives of its equitable power. Among the factors which must inform the sound discretion of the court in ordering partial withdrawal are the following: whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance....

We reach now the question whether the Court of Appeals erred in prohibiting the District Court from returning to DCSS partial control over some of its affairs. We decide that the Court of Appeals did err in holding that, as a matter of law, the District Court had no discretion to permit DCSS to regain control over student assignment, transportation, physical facilities, and extracurricular activities, while retaining court supervision over the ares of faculty and administrative assignments and the quality of education where full compliance had not been demonstrated....

That there was racial imbalance in student attendance zones was not tantamount to a showing that the school district was in noncompliance with the decree or with its duties under the law. Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by constitutional violation. Once the racial imbalance due to the de jure violation has been remedied, the school district is under no duty to remedy imbalance that is caused by demographic factors....If the unlawful de jure policy of a school system has been the cause of the racial imbalance in student attendance, that showing that condition must be remedied. The school district bears the burden of showing that any current imbalance is not traceable, in a proximate way, to the prior violation....

A history of good-faith compliance is evidence that any current racial imbalance is not the product of a new de jure violation, and enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future....

THE DISMISSAL OF A SCHOOL BUS DRIVER MAY BE AN ADMINISTRATIVE MATTER DELEGABLE TO THE DIRECTOR OF BUSINESS SERVICES.

Fremont RE-1 School District v. Jacobs
737 P 2d 816 (1987)

Supreme Court of Colorado

ROVIRA, Justice. Respondent Joyce Jacobs, a bus driver for the Fremont RE-1 School District, filed suit in May 1983 after she was fired by Norman Lemons, the school district's director of business services, in February 1983. She alleged that her firing was unlawful because the school board could not delegate to the director of business services the power to discharge her....We now conclude that the school board could lawfully delegate to its agents the task of firing bus drivers and that the standards set forth by the Fremont School Board in this case were adequate as a matter of law....

Undisputed facts in the record show that prior to the firing of Jacobs the Fremont Board of Education had adopted a policy for the discharge of "classified personnel"--which included bus drivers like Jacobs and also secretaries, office clerks, bookkeepers, and maintenance employees. The policy, which was published in an employee handbook, provided that:

> The Board of Education delegates to the Superintendent of Schools the authority to dismiss classified personnel. Further, the Superintendent of Schools may delegate this authority to the Director of Business Services and/or the Director of Personnel. Classified employees shall be employed for such time as the District is in need of, or desirous of, the services of such employees. The duration of employment is unspecified and solely rests at the discretion of the District....

In February 1983, following a disagreement between Jacobs and her superiors stemming from a disciplinary action Jacobs had taken on her bus, she was discharged by Lemons. Later, after Jacobs filed suit, the school board ratified her discharge.

The sole question presented for review here is whether the board of education could lawfully delegate to the superintendent of schools and, through him, to Lemons the authority to dismiss Jacobs....

We turn...to the rule of construction we adopted in Big Sandy School District No. 100-J v. Carroll,...which presented us with a similar issue. In that case, members of a school board informally authorized the superintendent to hire a principal-teacher and provided him with a signed, blank contract. Thereafter, the superintendent apparently hired one Barney Carroll for the post, but discharged him ten days later. Carroll sued for breach of contract. The issue, as a result, was whether the superintendent had authority to hire a principal-teacher without the school board's explicit approval of the job applicant and his rate of pay....We noted that it was the school board's "duty" to employ teachers....Analyzing the facts under this standard, we concluded that the power to employ teachers and fix their wages is a nondelegable statutory power which the legislature has conferred solely on the school board. It was thus not subject to delegation without explicit legislative authorization.

The principle announced in Bid Sandy serves several salutary purposes. By placing limits on the delegation of power by school boards, it assures the public that school board members--who are subject to public election--must take responsibility for significant policy decisions associated with management of the school district....Further, the rule protects school districts from incurring significant liabilities based on actions taken by school administrators without the full considered approval of the school board. Lastly, by limiting delegation as a rule of statutory construction, questions concerning the constitutionality of delegation of legislative powers are avoided....

However, we are convinced that the Big Sandy rule should not be extended beyond the limited purposes it serves. As a practical matter, school districts require a significant degree of administrative flexibility in order to function smoothly on a day-to-day basis between meetings of their school boards. As school organizations have grown in size and their functions have become more diverse and complex, the need for administrative delegation has become all the more imperative. If the law were to insist on strict limitations on delegation of authority, school board members might tend to become mired in the details of routine operations, and the effectiveness and usefulness of school administrators might be hampered. As a result, the trend in this area of the law has been to allow greater flexibility and away from the insistence on detailed and definite standards....

We have held that

> The School Board can select reasonable means to carry out its duties and responsibilities incidental to the sound development of employer-employee relations, as long as the means selected are not prohibited by law or against public policy....

Analyzing the question before us with these principles in mind, we conclude that the discharge of a bus driver is an administrative function subject to delegation by the school board. In our view, this action was not significantly related to the policy-making duties of the Fremont school board....In reaching this conclusion, we note that the character of this action--discharge of a bus driver--is collateral to the school board's educational mission and the significance of this action is not so great that the law should demand the formal accountability of school board members before recognizing the validity of the action....

The hiring and firing of teachers directly affect the education mission of the school district, and a central purpose for the election of school board members is to obtain their judgment on such matters. Actions that do not have a significant impact on institutional policy, on the other hand, are properly characterized as administrative in character and therefore are delegable...We do not believe the discharge of a bus driver significantly affects the Fremont school board's institutional policy; therefore, we agree with the court of appeals that the power to discharge Jacobs was properly delegable....

We disagree with the holding of the court of appeals that further investigation of the adequacy of the standards limiting the discretion of the school administrators is required in this case. In our view, the standards set forth by the Fremont school board were adequate as a matter of law. Under the school board's employee handbook, "classified employees" served at the will of the district except that they could not be dismissed on account of their religious beliefs, marital status, racial or ethnic background, sex or participation in community affairs.

Ordinarily, a delegation of discretion this board might run afoul of even the liberalized rules that have been applied to administrative delegation in recent cases. The requirement of standards to limit administrative discretion is designed to assure that administrative action will be rational and consistent and that subsequent judicial review will be available and effective....The law has traditionally accorded employers--including government agencies--broad discretion in the discharge of employees who are terminable at will. The general rule is that, absent a violation of constitutional rights, judicial review is not available to review the firing of an employee who is terminable at will....Such an employee may be dismissed without any justifying cause whatever....

The traditional rule with respect to local government employees has been that

> local government employees hold their posts at the pleasure of the proper local government authorities and can be dismissed with cause, in the absence of restrictions or limitations provided by law....

The...legislature has explicitly provided tenure for specified teachers but has adopted no comparable protections for "classified employees" like Jacobs....Furthermore, the Fremont school board has explicitly categorized classified employees as terminable at will....As a result, we are not convinced the rule of construction applied in Big Sandy should operate to override the considered policy choices of the legislature and the school board....In our view, the standards adopted by the school board are sufficient as a matter of law....

The judgment of the court of appeals is affirmed in part and reversed in part....

A STRIP SEARCH OF A STUDENT IN SEARCH OF A STOLEN $100 IS EXCESSIVELY INTRUSIVE.

Galford v. Mark Anthony B.
433 SE 2d 41 (1993)

Supreme Court of Appeals of West Virginia

BROTHERTON, Justice.

In this case, we are asked to rule on the constitutionality of a school principal's strip search of a student who was suspected of stealing money from a teacher's purse.

The appellant, Mark A.B., was a fourteen-year-old eighth grade student at Marlinton Middle School in Pocahontas County, West Virginia. On January 22, 1992, teacher Cathy Galford discovered that $100 in cash was missing from her purse, which she had placed under her desk during a period of the school day when her classroom was empty.

Galford reported the theft, and the incident was investigated by school social worker John Snyder. Snyder first called a male student other than the appellant into his office. Snyder described him as "one student in particular at Marlinton Middle School that has had a history of taking things that aren't his." After talking with this student, Snyder asked that he turn his pockets and socks inside out, and he also felt his pants legs and shirt. Snyder states that he "[d]idn't ask him to strip. But I didn't find any money on him."

Soon thereafter, Snyder learned that the appellant had been assigned to help the janitor with minor duties such as emptying trash cans and pencil sharpeners, and that it was likely he had been in Galford's classroom alone. Snyder next called the appellant into his office. The appellant admitted that he had been in the classroom by himself but denied that he took the money. Snyder also asked the appellant to pull out his pockets and roll down his socks so that he could see all the areas of the appellant's outer clothing where money might have been concealed. Snyder reported to the school principal, Tom Sanders, that he found nothing, and concluded that "[the money] is not anywhere unless it's in his underwear."

The principal then took the appellant into the boy's bathroom and looked in his pockets and socks. Sanders also asked the appellant to take off his pants, and the appellant lowered them to his knees. Sanders then asked him to pull his underwear open in front and back. The missing $100 was in the back of the appellant's underwear.

After the principal seized the evidence, the appellant admitted that he took the $100 from Galford's purse because he needed spending money for a trip home the following weekend. Sanders accompanied the appellant when he returned the money to Galford and apologized for taking it.

Galford initiated criminal proceedings against the appellant on February 6, 1992, seeking to have him declared a delinquent child pursuant to W.Va.Code....On April 30, 1992, the lower court denied the appellant's motion to suppress the evidence which was obtained as a result of the strip search and accepted his guilty plea to the petit larceny charge. The appellant was ruled delinquent and directed to undergo evaluation at the Industrial Home for Youth in Salem, West Virginia, in order to aid in determining an appropriate sentence.

Because of earlier theft-related convictions, the appellant was denied probation. On June 1, 1992, he has sentenced to one year in the West Virginia Department of Corrections. The court subsequently suspended the sentence, placed the appellant on probation for eighteen months, and ordered him to remain in the custody of the West Virginia Department of Human Services.

The appellant now argues that the lower court erred in denying his motion to suppress in its April 30, 1992, order. On appeal, the appellant maintains that the strip search conducted by the school principal was "excessively intrusive" and violated constitutional rights guaranteed to him by the Fourth Amendment of the United States Constitution....

...[I]n T.L.O the United State Supreme Court developed the following analysis for determining the reasonableness of warrantless student searches conducted by school officials: (1) the search must be "justified in its inception," meaning that teachers and administrators can search a student only if "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school;" and (2) once properly initiated, the scope of the search would be defined by the reasonableness of the methods used in the context of the objectives of the search, the age and sex of the student, and the nature of the suspected infraction....

In the case now before us, the school officials clearly had reasonable grounds for focusing their suspicions upon the appellant. His access to the empty classroom and the fact that he was serving a two-year probation term for attempted burglary combined to create a reasonable and individualized suspicion that the appellant had taken the missing money. Thus, we find that the first prong of the T.L.O. analysis was satisfied, as there was an initial justification for a search....

In this case, then, we must next determine whether the principal's strip search of the appellant was an "excessively intrusive" search of a student in the school setting. We are necessarily guided to some degree by the United States Supreme Court's analysis in T.L.O regarding a student's expectations of privacy. However, we point out that the United States Supreme Court has never decided a case which involved a strip search of students, nor did the T.L.O. Court indicate whether its reasonableness standard would apply to strip searches of students....

As some point, a line must be drawn which imposes limits upon how intrusive a student search can be. We certainly cannot imagine ever condoning a search that is any more physically intrusive than the one now before us. Looking inside of a student's underwear is an invasion of person's privacy that should not be equated with searching a student's locker or other personal possessions.

The T.L.O. Court obviously intended for there to be constraints on how far a search could ultimately extend, even when there are "reasonable grounds" and/or an individualized suspicion to justify the initial search. Otherwise, the Court would not have included the scope of the search as a second element of their overall "reasonableness" analysis....

...[W]e cannot uphold the strip search of the appellant as reasonable. The appellant was suspected of stealing money. Such activity should never be condoned or encouraged in our schools. However, evaluating the nature of the suspected infraction strictly in terms of the danger it presents to other students, it does not begin to approach the threat posed by the possession of weapons or drugs. Quite simply, the appellant's suspected conduct did not pose the type of immediate danger to others that might conceivably necessitate and justify a warrantless strip search. The scope of this particular search exceeded what could be defined as reasonable under the circumstances. As we noted above, the T.L.O. Court indicate that "the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools....Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy."...

We conclude that in the absence of exigent circumstances which necessitate an immediate search in order to ensure the safety of other students, a warrantless strip search of a student conducted by a school official is presumed to be "excessively intrusive" and thus unreasonable in scope.

Because we find that the strip search of the appellant was excessively intrusive and unreasonable in violation of his constitutional rights, we reverse....

GROSSLY EXCESSIVE PUNISHMENT, SHOCKING TO THE CONSCIENCE, VIOLATES A STUDENT'S SUBSTANTIVE DUE PROCESS RIGHTS.

Garcia by Garcia v. Miera
817 F 2d 650 (1987)

United States Court of Appeals, Tenth Circuit

LOGAN, Circuit Judge....Teresa Garcia, an elementary school pupil in New Mexico, by her parents and next friends, Max and Sandra Garcia, sued the defendants in their individual capacities for denying her substantive due process...because of two beatings suffered at their hands. After considerable discovery, the defendants filed a motion for summary judgment, which the court granted. The district court concluded that the defendants were shielded from liability "by the defense of good faith immunity,"...because the "law governing whether excess corporal punishment can give rise to a substantive due process claim is not clearly established." Garcia has appealed the court's order, contending that at the time of the beatings excessive corporal punishment by school officials did violate her clearly established substantive due process rights.

In 1982 Garcia was a nine-year-old student in the third grade at the Penasco Elementary School in Penasco, New Mexico. On February 10, 1982, defendant-appellee Theresa Miera, the school principal, summoned Garcia to her office for hitting a boy who had kicked her. Miera instructed Garcia to go to her chair to be paddled. Garcia refused and told Miera that her father had said that "Mrs. Miera had better shape up."

Miera responded by calling defendant J.D. Sanchez, a teacher at the school, for assistance. Sanchez held Garcia upside down by her ankles while Miera struck Garcia with a wooded paddle. The paddle "was split right down the middle, so it was two pieces, and when it hit, it clapped [and] grabbed." Miera hit Garcia five times on the front of the leg between the knee and the waist. After the beating, Garcia's teacher, Ruth Dominez, "noticed blood coming through [the child's] clothes," and, on taking Garcia to the restroom, was shocked to see a "welt" on Garcia's leg. The beating made a two-inch cut on her leg that left a permanent scar. Shortly after this incident, Garcia's mother and father told Miera "not to spank Teresa again unless we are called, to make sure it was justified, and [the principal] said okay, no problems."

The second beating at issue occurred on May 13, 1983. Miera summoned Garcia to her office for saying that defendant Judy Mestas had been seen kissing a student's father, Denny Mersereau, on a school bus during a recent field trip and Mestas had sent love letters to Mersereau through his son.

Miera proceeded to strike Garcia two times with the paddle on the buttocks. Garcia then refused to be hit again. Miera responded by calling defendant Edward Leyba, an administrative associate at the school. Leyba pushed Garcia toward a chair over which she was to bend and receive three additional blows. Garcia and Leyba struggled and Garcia hit her back on Miera's desk, from which she suffered back pains for several weeks. Garcia then submitted to the last three blows. The beating caused several bruises on Garcia's buttocks, which did not stop hurting for two to three weeks. The report of the school nurse indicates that as a result of the beating Garcia's buttocks [appeared] bright red with a crease across both." Dr. Albrecht, a physician who treated Garcia, stated: "I've done hundreds of physicals of children who have had spankings....I have not seen bruises on the buttocks as Teresita had, from routine spankings....They were more extensive, deeper bruises."...Betsy Martinez, a nurse who examined Garcia, stated that if a child had received this type of injury at home she "would have called...Protective Services." The extent and severity of Garcia's bruises is independently supported by photographs of Garcia's buttocks taken on May 13 and May 18. Through the May 13 incident, Garcia kept asking Miera to allow her to call her mother. The principal refused, saying that she knew the law.

Some of these allegations were disputed by defendants in their affidavits and testimony. For purposes of reviewing the district court's grant of summary judgment to defendants, however, we must determine whether the allegations and facts recited above, if believed by the trier of fact, would establish a constitutional wrong for which plaintiff could recover.

We first consider whether corporal punishment of a school child, in any degree of excessiveness, can violate substantive rights under the Due Process Clause. Despite the Supreme Court's explicit disclaimer that it was deciding that issue in Ingraham v. Wright,...we believe that Ingraham requires us to hold that, at some point, excessive corporal punishment violates the pupil's substantive due process rights. Rejecting the four dissenters' views that corporal punishment could violate the Eighth Amendment, the majority found the Due Process Clause applicable. The Court declared that"corporal punishment in public schools implicates a constitutionally protected liberty interest." It recognized that among the liberty interests "'long recognized at common law as essential to the orderly pursuit of happiness by free men'" is the "right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security," including "bodily restraint and punishment."..."Where school authorities, acting under color of state law, deliberately decide to punish a child for misconduct by restraining the child and inflicting appreciable physical pain, we hold that Fourteenth Amendment liberty interest are implicated." This language plainly indicates that the infliction of corporal punishment can affect a fundamental right susceptible to substantive due process protection....

Although the Ingraham opinion focuses on procedural due process, it discusses the history of corporal punishment in the law and applies a balancing test between the child's interest in personal security and the traditional view that a school may need to be able to impose "limited" or "reasonable" corporal punishment: "There can be no deprivation of substantive right as long as disciplinary corporal punishment is within the limits of the common-law privilege."...

Although Ingraham makes clear that ordinary corporal punishment violates no substantive due process right of school children, by acknowledging that corporal punishment implicated a fundamental liberty interest protected by the Due Process Clause, we believe that opinion clearly signaled that, at some degree of excessiveness or cruelty, the meting out such punishment violates the substantive due process right of the pupil.

Indeed, such a view is compelling and the general principle underlying it has been recognized at least since Rochin v. California...when the Supreme Court held that...official conduct [by police officers] that "shocks the conscience" [and] force that is "brutal" or "offensive to human dignity," offends the Due Process Clause....

This circuit applied that notion in the context of a school, albeit one for problem children, in Milonas v. Williams....Our decision in Milonas...rejected the argument that such physical abuse was reasonably related to the legitimate objective of the Provo Canyon School, and concluded that the defendants' actions violated the plaintiffs' due process rights....

We here reaffirm our view, set out in Milonas, that at some point of excessiveness or brutality, a public school child's substantive due process rights are violated by beatings administered by government-paid school officials....

We believe the necessary inference from the Supreme Court's Ingraham decision is that excessive corporal punishment less offensive than the definition quoted above does not rise to the level of a constitutional substantive due process violation. Such lesser violations implicate only a pupil's procedural due process rights. Thus, if the state were to provide no adequate remedy to deter this lesser degree of official conduct and compensate the victim of that misconduct, we would find a violation of procedural due process.

We thus envision three categories of corporal punishment. Punishments that do not exceed the traditional common law standard of reasonableness are not actionable; punishments that exceed the common law standard with adequate state remedies violate procedural due process rights, and finally, punishments that are so grossly excessive as to be shocking to the conscience violate substantive due process rights, without regard to the adequacy of state remedies....

...We believe that Court's refusal in Ingraham to address substantive due process claim does not...mandate a conclusion that the law was not clearly established....The concept of the substantive due process right is implicit in Ingraham. Indeed, before the first beating of Garcia, the author of the Ingraham, majority, Justice Powell, describing the contours of substantive due process, had cited with approval the proposition that "corporal punishment of students may have violated due process if it 'amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.'"...

...We believe the law was clearly established before Milonas that some high level of force in a corporal punishment context would violate a child's substantive due process rights. We think a reasonably competent legal advisor to a school district should have realized that egregious invasions of a student's personal security would be unconstitutional....

The threshold for recovery on the constitutional tort for excessive corporal punishment is high. But the allegations with respect to the first beating, that this nine-year-old girl was held up by her ankles and hit several times with a split board of substantial size on the front of her legs until they bled--supported by evidence of a permanent scar--are sufficient. The allegations with respect to the second beating, that the punishment was severe enough to cause pain for three weeks--supported by pictures of the injured buttocks, an affidavit from an examining doctor that in his long experience had not seen bruises like that from routine spankings, and an affidavit from an examining nurse that if a child had received this type of injury at home she would have reported it as child abuse--are also sufficient. These claims may not survive the crucible of the trial, but they overcome defendants' motion for summary judgment.

Reserved and remanded for further proceedings consistent herewith.

A SCHOOL DISTRICT IS NOT LIABLE FOR A TEACHER'S SEXUAL ASSAULT OF A STUDENT WHERE NO CAUSAL LINK TO THE BOARD HAS BEEN DEMONSTRATED.

Gates v. Unified School District No. 449
996 F 2d 1035 (1993)

United States Court of Appeals, Tenth Circuit

BARRETT, Senior Circuit Judge.

Plaintiff Gina L. Gates (Gates or Plaintiff) appeals the district court's grant of summary judgment in favor of defendants, United School District No. 449 of Leavenworth County, Kansas (School District or Board) and Donald E. Simmons, Principal of Pleasant Ridge High School (Simmons). We affirm....

Gates' basic complaint is that although the School District had no written policy authorizing, condoning or encouraging inappropriate sexual conduct between teachers and students, the defendants, by virtue of their conduct, impliedly authorized, condoned and encouraged such behavior by failing to thoroughly investigate, discipline and safeguard students from such conduct. Gates contends that such conduct became the custom or unwritten policy of the school district...

A summary review of the depositional evidence and some exhibits follows:

Donald Navinsky, a former member and president of the school board (1981-89), testified that "during the spring of 1985, the board had to determine whether to grant [Michael] Dragoo tenure; Cheryl Parker was then a senior at the high school, and her father, Richard Parker, appeared before the board in executive session and, in tears, reported that Dragoo was chasing his daughter, that Cheryl was infatuated with Dragoo, and that Dragoo was the first guy who had shown any interest in Cheryl; when the board convened to determine whether to retain or terminate Dragoo, no member of the Parker family appeared, but some thirty people appeared on Dragoo's behalf; the board was divided as to whether to retain Dragoo even though no one had appeared at the meeting opposing his retention; neither Superintendent Fagan nor Principal Simmons had any knowledge of Dragoo's relationship with Cheryl Parker....and the board voted to retain Dragoo, 5 to 2....

Dragoo and Cheryl Parker were married shortly after her graduation from high school; there was no question in his mind that the board would not tolerate a teacher having inappropriate contact with a student, and certainly sexual contact would be inappropriate; after Dragoo's marriage to Cheryl Parker, he asked questions about Dragoo, and while he heard some rumors, there was no information provided the board between 1985 and May of 1988 regarding any inappropriate misconduct by Dragoo....

Gina Louis Gates, plaintiff, testified that: in 1988, she was a senior and attended Dragoo's vocational agriculture class; earlier that year, probably the middle of March, 1988, after a class, Dragoo tickler her and touched her breasts, and when she ask him to stop, he did; she did not report this incident to anyone because she was scared that it would hurt other people and she was embarrassed; she saw Dragoo tickle and "play around" with other female students but she didn't report that; on May 5, 1988, after class she went to Dragoo's desk for help concerning a class paper, and after he helped her, Dragoo fondled her breasts; she stated that after the May 5, 1988, incident, her friend, Carmen Stillian, while then a student in the high school told her that Dragoo had assisted her in obtaining an abortion....

Ronald Fagan, former Superintendent of the school district, testified that:...he received a call from Cheryl Parker's mother who indicated that she was concerned about the relationship between her daughter and Dragoo; he notified the president of the board about the call and set the matter for discussion at the next board meeting; when the board met, no complaints were made against Dragoo by the Parkers or anyone else, while a large number of people appeared in support of Dragoo....

Donald Simmons, former Principal of Pleasant Ridge High School, testified that: he had no knowledge that Dragoo was pursuing Cheryl Parker in 1985, he was never contacted relative thereto by Cheryl's parents and no complaints were made to him about the matter;...and that had he received a complaint that Dragoo was involved in inappropriate contact with female students, he would have taken immediate action.

Simmons stated that; he attended the executive session of the board in February, 1985, to present his evaluation of Dragoo for tenure; as a classroom teacher, Dragoo met all expectations of the school district and the students; Cheryl Parker's father, Richard, did not contact him; he had no knowledge or information that Dragoo was romantically involved with Cheryl Parker but that obviously he was because Dragoo and Cheryl were married when she was 18 years of age and that fact would not impact Dragoo's job....In February, he submitted an evaluation of Dragoo wherein he complimented Dragoo for making the students feel important and respected, but he also noted that Dragoo should be aware that traveling to and attending activities with students could jeopardize his professional relationship with them; in 1988, Superintendent Fagan inquired about Dragoo, and he replied that he had no way of responding to rumors or innuendo and that all he could respond to were the written evaluations of Dragoo's teaching performance; and that there was never any substantiation to the board of rumors concerning Dragoo.

Simmons also stated that: he was first informed of the incident involving Dragoo and Gina Dates in later June of 1988, when he was contacted by a detective with the Leavenworth County Sheriff's office...[H]e notified Superintendent Fagan that Dragoo had been arrested for inappropriate sexual contact with a student; on July 18, 1988, the board suspended Dragoo from his teaching position pending an investigation into the incident; and that on August 1, 1988, the board initiated termination proceedings against Dragoo and Dragoo surrendered his teaching certificate.

On April 7, 1989, Dragoo was convicted of the sexual battery of Gina Gates in Leavenworth District Court. Thereafter, and as a result of the board's action taken against Dragoo, the Kansas State Board of Education revoked Dragoo's teaching certificate on August 8, 1989.

Dragoo was named in a 1987 report by the Kansas Department of Social and Rehabilitation Services (SRS) alleging that he had sexually abused Christine Chapman, a student at Pleasant Ridge High School. That report was not make known to the board, the superintendent or the principal until this action was filed.

It was teacher Louise Lind who reported the sexual abuse incident involving Gina Gates and Dragoo to the SRS on May 7, 1988, after one of Gina's friends told Lind about it. Lind did not inform the superintendent, principal or any board members of the incident. A report was filed with the Leavenworth County Sheriff's office on May 20, 1988, but Simmons knew nothing about it until he was contacted by Detective Spellman....

The court found that plaintiff's claim against the defendants premised upon the existence of a custom of failure to receive, investigate, or act upon complaints of violations of constitutional rights could not withstand summary judgment because the alleged pattern of misconduct was not so "'permanent and well settled' as to have the effect and force of law."...The court reasoned that in this case there is simply no evidence to substantiate the existence of a "continuing, widespread, persistent pattern of misconduct" that had been "so permanent and well settled" as to have the effect and force of law; further, even assuming that such a pattern could be established, there is no showing that the defendants had notice of it or that the purported custom was the cause or moving force behind the misconduct in this case.

As to whether a policy of the defendants exposed them to liability, the court reasoned that policy is a course of action which has been approved by the policymaking body (board) through formal policymaking procedures...constituting a deliberate choice of action with respect to the subject matter in question.... Reasoning that in order to hold the school district liable, plaintiff must demonstrate that the district's policy constituted deliberate indifference or reckless disregard for her constitutional right....[T]he court found that plaintiff had failed to demonstrate that the board had notice of a prior constitutional violation. The court stated that considering all of the facts in the light most favorable to the plaintiff, the most that could be said is that the board knew that Dragoo had been romantically involved with Cheryl Parker in that Cheryl was infatuated with Dragoo, and that Dragoo had encouraged her. The court observed that there was no complaint that Dragoo had sexually assaulted Cheryl or engaged in any sexual misconduct with her. The court found that this knowledge was simply insufficient to place the board on notice that the female students' constitutional rights to personal security and freedom from sexual assault were in jeopardy; accordingly, as a matter of law, the board did not act with deliberate indifference or reckless disregard for plaintiff's constitutional rights. Further, the court found that plaintiff failed to produce any evidence establishing a causal like between the policy in question and the constitutional deprivation, and "[i]t is a far reach even to find that the challenged policy is 'a deliberate choice of action with respect to the subject matter in question.'"...

In light of the "glaring deficiencies in proof," the district court found that it had no alternative but to enter summary judgment on behalf of defendant Simmons....

...[T]he plaintiff must go beyond her pleadings and show that she has evidence of specific facts that demonstrates that the defendants exhibited deliberate indifference or reckless disregard....

With respect to the school district's liability, we agree with the district court that the evidence would not support a finding of the existence of a pattern of persistent and widespread unconstitutional practices that had become so permanent and well-settled as to have the force and effect of law. The evidence does not demonstrate that the defendants had notice of a pattern of unconstitutional acts, or that the defendants displayed deliberate indifference or tacitly authorized the violation of plaintiff's constitutional rights. Thus, we agree with the district court's conclusion that no custom or policy of deliberate indifference to or tacit authorization of the unconstitutional conduct practiced by Dragoo could be attributed to the school district....

Here, there is no evidence of any board policy or custom which caused Gates to suffer a constitutional deprivation at the hands of Dragoo. While there may have been some negligence on the part of the board and/or Simmons in failing to adequately investigate rumors of inappropriate conduct by Dragoo, we have made it clear that liability under section 1983 must be predicated upon a "deliberate deprivation of constitutional rights by a defendant."...

We AFFIRM.

THE ESTABLISHMENT CLAUSE IS INHERENTLY VIOLATED WHEN PRAYER IS OFFERED AT HIGH SCHOOL GRADUATION REGARDLESS OF WHO DECIDES PRAYER WILL BE GIVEN AND WHO AUTHORIZES THE ACTUAL WORDING.

Gearon v. Loudoun County School Board
844 F Supp 1097 (1993)

United States District Court, E.D. Virginia

BRYAN, District Judge.

The issue in this action is whether the defendant, Loudoun County School Board (the School Board) and its Division Superintendent and the principals at the four high schools in Loudoun County, Virginia, violated the Establishment Clause of the First Amendment by permitting certain remarks made by students at high school graduation ceremonies in the Spring of 1993....

The defendants assert that the remarks delivered were student-initiated, student-written and student-delivered, and, therefore, lacked the pervasive government involvement condemned in Lee v. Weisman....

The plaintiff, on the other hand, primarily argue that prayer in graduation ceremonies is per se unconstitutional regardless of the manner in which the decision to have prayer is made and how the prayer is presented. Plaintiffs rely on Lee for the proposition that, at the secondary school level, it is offensive to the Establishment Clause for the state to place students in a coercive setting where their options are to (1) not attend their graduation, (2) attend and be disruptive, or (3) attend and participate in the ceremony regardless of their objections to the religious nature of the ceremony. Plaintiffs further argue that the state sponsorship of a graduate ceremony cannot be insulated from government entanglement by delegating to a majority of the members of the graduating class the decision whether prayers are to be included....

The Court is persuaded that the correct view is the one represented by plaintiffs' primary argument, i.e., a constitutional violation inherently occurs when, in a secondary school graduation setting, a prayer is offered, regardless of who make the decision that the prayer will be given and who authorizes the actual wording of the remarks.

The degree of state sponsorship of the prayer at issue in Lee made it an "easy" case. Even so, the broad principles set forth by the Court concerning the coercive pressures, peer and public, on dissenting students were an essential part of the Court's decision and cannot be ignored....

State sponsorship, i.e., involvement in, a graduation ceremony is inherent. A high school graduation, and certainly one's right and desire to attend, is an important ingredient of school life--as much as attending class. To involuntarily subject a student at such an event to a display of religion that is offensive or not agreeable to his or her own religion or lack of religion is to constructively exclude that student from graduation, given the options the student has. The Establishment Clause does not permit this to occur.

Nor can the state simply delegate the decision as to a prayer component of that ceremony to the graduating class without offending the Establishment Clause. The notion that a person's constitutional rights may be subject to a majority vote is itself anathema. The graduating classes in Loudoun County certainly could not have noted to exclude from the ceremonies persons of a certain race. To be constructively excluded from graduation ceremonies because of one's religious or lack of religion is not a great deal different....

Alternatively, the court finds that even if a graduation at the high school level is not inherently state-sponsored nor inherently coercive, the facts here demonstrate an excessive state entanglement with religion in violation of the Establishment Clause. Although the actions of each of the four schools differed slightly, for all of them the graduation is a state-sponsored event. Applicable to all of them was Superintendent Hatrick's Memorandum which, and this is the only interpretation which can realistically be given the Memorandum, pointed out that Jones revealed a way to avoid the proscription of Lee. Both cases were mentioned by name in the Memorandum. Applicable to all four schools was the April 6, 1993 Resolution of the School Board which exhorted student-sponsored invocations and benedictions at high school graduations. At all schools the same form of ballot, prepared by school officials, was used....

At all of the schools except Loudoun Valley High School, the principals took action to initiate a senior class meeting at which to vote, after first meeting with class officers and class faculty advisors. All class meetings held were mandatory for seniors at school that day. At all schools except Loudoun Valley, there was faculty or principal review of the remarks before they were made. At Loudoun Valley the principal reserved the "right" to review. In some cases, members of the clergy reviewed the remarks. Some of the class officers were told of the Hatrick Memorandum. At Broad Run the principal discussed with the class the Lee and Jones cases by name. At Park View the Hatrick Memorandum was read to the class officers and again at the class meeting. At Loudoun County High School the principal selected the group (seven academically top ranked seniors) from which the speaker would be chosen if the class voted to have a prayer....

The effect of the foregoing is to advance the religion of those who believe in a deity at the expense of non-believers, Jews, or other non-Christians. And indeed, as established, by the affidavits of Moline and Bantley, the non-denominational characterization of the remarks effectively exclude Jews or other Non-Christians, thus inhibiting their religion. In any event, even if defendants could persuade the court that the graduation prayer had a clearly secular purpose and neither advanced or inhibited religion, they would not prevail here. As noted above, the extent of state entanglement with religion on these facts requires the court to find an Establishment Clause violation....

For the foregoing reasons, the court will declare that permitting prayer in a state or School Board sponsored high school graduation is a violation of the Establishment Clause of the First Amendment; and that the manner in which the School Board and its superintendent and principals permitted prayer in the high schools does not reflect a clearly secular purpose, has a primary effect that advances or inhibits religion and does not avoid excessive government entanglement with religion. An injunction will issue forbidding the defendants from permitting prayer at Loudoun County, Virginia, high school graduation ceremonies....

THE SCHOOL DISTRICT IS NOT LIABLE FOR A TEACHER'S SEXUAL MOLESTATION OF A STUDENT WHERE IT WAS NOT SHOWN THE BOARD HAD A POLICY OF DELIBERATE INDIFFERENCE TO THE STUDENT'S CONSTITUTIONAL RIGHTS.

Gonzalez v. Ysleta Independent School District
996 F 2d 745 (1993)

United States Court of Appeals, Fifth Circuit

PATRICK D. HIGGINBOTHAM, Circuit Judge:

This appeal raises difficult questions of law in a difficult, tragic setting. Jessica Gonzalez was sexually molested by Andres Mares, her first grade teacher, while attending one of the elementary schools with the Ysleta Independent School District [YISD]. After Jessica's parents, Gloria and Victor Gonzalez, discovered that the YISD Board of Trustees had elected to keep Mares in the classroom in the face of similar allegations of sexual abuse two years earlier, they brought this section 1983 action against the school district in the U.S. District Court for the Western District of Texas. The case went to the jury on the claim that the district policy regarding sexual abuse was a legal cause of the denial of Jessica's constitutional right to bodily security. The verdict was $500,000.

On appeal, YISD contends that the district court should have instructed the jury that the school district could be held liable under section 1983 only if the Board's failure to relieve Mares of his teaching duties manifested a deliberate indifference to the constitutional rights of students. The school district also submits that the trial evidence is insufficient to support a finding of liability under this heightened standard of fault. We agree and, finding that the second claim requires reversal, we reverse and render judgment in favor of the school district.

Ysleta Independent School District is the seventh-largest in Texas, educating over 50,000 students....In 1984, YISD adopted a written policy incorporating provisions of the Texas Family Law Code. In accordance with Texas law, the policy provided that "any person(s) who suspects that a child's physical or mental health or welfare has been, or may be, adversely affected by abuse or neglect...must report his or her suspicions to the Texas Department of Human Resources and/or to a law enforcement agency."...The results of the operation of this policy were fairly uniform: With one exception, every complaint of abuse from 1983 to 1987 led to the permanent removal of the teacher in question from any contact with school children.

The exception to this otherwise unbroken pattern of teacher removal was Andres Mares, the man who molested Jessica Gonzalez. Mares' penchant for inappropriate conduct with his young female students first surfaces in 1981. He was at that time a Spanish teacher at the Ascarate Elementary School. In November 1981, Nellie Morales, Principal of Ascarate, received a complaint from the parent of one of his students. The parent informed Principal Morales that Mares frequently allowed girls to sit on his lap during class, a practice the parent and Morales considered highly improper. After consulting Rudy Resendez, Assistant Superintendent for Elementary Schools, Morales responded to this report with an informal memorandum and an oral reprimand of Mares. She nonetheless received a second, more serious complaint from the same parent one month later, alleging that Mares had this time placed his hand around the waist of her daughter. Even though the child and Mares both verified the incident, Morales' disciplinary response was limited to issuing a second oral reprimand and directing Mares to enter a general "improvement" program. This sanction in any event apparently had a salutary effect, as allegations regarding Mares' conduct came to a temporary halt.

In January 1985, however, Principal Morales received an urgent phone call from Fraciela Pena, the mother of one of the female students in Mares' fifth grade Spanish class. Mrs. Pena insisted that Morales remove her daughter, Leticia, from Mares' class at one. When asked the reason for this request, Mrs. Pena, after some hesitation, informed Morales that Leticia had told her that Mares had placed his hand on her waist and stuck his tongue in her ear. Morales again sought direction from Resendez regarding the course of investigation. Resendez this time enlisted the aid of Kenneth DeMore, who, as the school district's Director of Employee Relations, usually handled teacher grievances and complaints. Morales first met with Mares to discuss the incident. Mares admitted that he had been alone in the classroom with Leticia and had placed his hand around her waist, but denied any further improper conduct. Morales and DeMore interviewed Leticia a few days later on February 4, 1985. Leticia told them that Mares had approached her from behind as she was drawing at the blackboard, wrapped his arm around her waist, and stuck his tongue in her ear.

...Morales, Demore, and Resendez neither called the Department of Human Resources nor took any immediate remedial steps on their own. Rather, the school officials decided to "drop the matter" and merely include the incident in the customary evaluation of Mares' overall classroom performance. All three officials stated that this abrupt conclusion of the investigation came at the request of Mrs. Pena, who, according to their testimony, made it clear that she wished to proceed no further....

...While the record discloses that the Board, after discussion of the matter, ultimately voted in favor of transferring Mares, it is not clear whether its consideration of this issue was confined to a single evening or extended over several meetings during late

May and early June. It is clear, however, that Fernando Pena [father and a board member] whose testimony provided the only direct evidence of the Board's deliberations vigorously opposed the administration's recommendation and demanded that more serious measures be taken. Pena had castigated the administration during the first meeting, but he now focused his fire on the Board itself: "[I]n one of my temper tantrums, I said, 'I wouldn't wish this [the abuse of a child' on anybody but this school board, because they need to be in my shoes to see how it feels.'" Despite his persistence and his sharp criticism of the Board, Pena testified that he "didn't have the votes" and thus "could never get anybody to do anything except transfer him." Pena continued to view the transfer of Mares as plainly "inadequate," but also recognized that it was the most he could hope to "extract" from his fellow Board members.

Mares' first year at Glen Cove Elementary School passed without incident. On March 9, 1987, however, Mares molested Jessica Gonzales, one of the students in his first grade Spanish class. The record showed that the assault occurred after Jessica asked Mares for permission to get a drink of water. After Jessica left her seat, Mares followed her over to the water fountain and, as she leaned over, placed his hand inside her underwear and touched her vagina. When Jessica reported Mares' actions to her mother that afternoon, Gloria Gonzalez immediately returned to school with her daughter and a family friend to speak to Richard Gore, Glen Cove's Principal.

Gore "did not go into the full details" of the incident at this brief meeting and thus did not obtain a statement from Jessica, but he was able to gain the substance of the allegation from Mrs. Gonzalez. Gore also learned that the Gonzalezes had already contacted the police. In accordance with YISD policy, Gore reported the alleged assault to the Texas Department of Human Resources and then consulted Resendez. Resendez decided immediately to suspend Mares with pay pending a hearing before the Board of Trustees. Notwithstanding the Gonzalezes' refusal to cooperate in the investigation, the Board held a hearing and voted to suspend Mares without pay pending the outcome of the criminal investigation into the incident. After a trial in Texas state court, at which Leticia Pena and Jessica Gonzalez both testified, Mares was convicted on charges of indecency with a child. The Board fired Mares on grounds that he had been convicted of a felony in August 1987.

The Gonzalezes filed this section 1983 suit in U.S. District Court for the Western District of Texas in March 1989, contending that their daughter's injuries were attributable to the school district's policies and customs regarding sexual abuse....

...[W]e do not believe that the record supports a finding that the Board acted with deliberate indifference in failing to relieve

Mares of his teaching duties. It is of course true that Mares would not have had the opportunity to assault Jessica had the Board removed him from the classroom after it learned of Leticia Pena's allegation in 1985. We also, agree, and YISD appears to concede, that the Board's choice to transfer Mares rather than impose a more severe sanction was not only negligent but also inconsistent with the district's handling of other cases of suspected sexual abuse. But these facts, by themselves, are not sufficient to establish that the Board was deliberately indifferent to the welfare of students in making its decision.

The Board did not ignore or turn a blind eye to the Penas' complaint when it came to its attention. Instead, it immediately asked the district's superintendent and his deputy personally to investigate the incident and prepare a recommendation. The report Board members receive found that the evidence was not strong enough to justify termination proceedings, but recommended that Mares be issued an official reprimand and a transfer out of Ascarate Elementary School. The Board's adoption of these precautions reflect not indifference or apathy, but concern....

Nor can we understand how the inadequacy of these disciplinary measures could have been "obvious"...to the Board at the time of its decision. Board members were aware that two accusations, separated by four years, had been lodged against Mares. These allegations, while certainly a cause for concern, did not compare in gravity to Mares' conduct in 1987, and thus provided no grounds for suspecting that he might be capable of such a vile act. Moreover, the deputy superintendent, on whose factual findings the Board was surely entitled to rely, stated that he had virtually no proof that Mares touched Leticia Pena in the manner she initially reported. To hold that these facts support a finding that the Board was "deliberately indifferent" would drain the term of its meaning. While sympathy for Jessica and her parents and anger toward those whose acts contributed to this tragic occurrence are understandable, our precedents do not permit us to hold the school district responsible for this harm.

For the foregoing reasons, we REVERSE and RENDER judgment in favor of the Ysleta Independent School District.

WHERE A SCHOOL ESTABLISHES A PUBLIC FORUM, IT MAY NOT DENY A STUDENT RELIGIOUS CLUB ACCESS BASED ON ITS RELIGIOUS PERSPECTIVE BECAUSE THIS PRACTICE IS VIEWPOINT DISCRIMINATION IN VIOLATION OF FREE SPEECH.

Good News/Good Sports Club v. School District
of the City of Ladue
28 F3d 1501 (1994)

United States Court of Appeals, Eighth Circuit

MAGILL, Circuit Judge.

The Good News-Good Sports Club (the Club) and individuals affiliated with the Club appeal the district court's judgment denying their challenge to the use-of-premisses policy (Amended Use Policy) of the School District of the City of Ladue, Missouri (School District) that closes the School District's facilities between 3 and 6 p.m. on school days to all community groups except for the Scouts and athletic groups. The Amended Use Policy also contains a proviso that prohibits the Scouts from engaging in any religious speech from 3 to 6 p.m. Because the Amended Use Policy results in viewpoint discrimination that does not serve a compelling governmental interest, we reverse the judgment of the district court.

The Club is a community-based, non-affiliated group that seeks to foster the moral development of junior high school students from the perspective of Christian religious values. Club advertisements state that the Club is not sponsored by the School District. Parent volunteers run the Club meetings. The Club is open to junior high school students regardless of their race, creed, denomination, or sex. The Club does require, however, parental consent before a student may attend a meeting. Club activities include skits, singing (including Christian songs), role playing, Bible reading, prayer, and speeches by community role models. The Club is religious, but non-denominational.

The Club first met at the Ladue Junior High school in late 1988 and continued to meet through Spring 1992....

In February 1992, several residents of the School District attended a school board meeting and complained about the religious content of the Club's meetings....In late March, the school board passed a resolution allowing the Club to continue meeting for the remainder of the year. In July, the school board adopted the Amended Use Policy that closed the School District to all community groups, except the Scouts and athletic groups, between 3 and 6 p.m. on school days....The exemption for the Scouts was based on the School District's "long-standing tradition of cooperation with scout programs."...The Amended Use Policy excluded the Club from meeting at its regularly scheduled time, but allowed the Club access to school facilities after 6 p.m. on school days, and after 8 a.m. on weekends. The Club filed suit in district court, seeking injunctive and declaratory relief based on its First Amendment rights.

After a bench trial, the district court returned a judgment in favor of the School District....

The Club raises numerous grounds for reversal; we need consider only one: whether the Amended Use Policy results in impermissible viewpoint discrimination as described in Lamb's Chapel v. Center Moriches Union Free School District....We hold that the Amended Use Policy results in viewpoint discrimination against the Club that does not serve a compelling governmental inters, and therefore, we reverse....

...[T]he School District argues that the district court properly held that its reason for adoption of the Amended Use Policy was reasonable and did not constitute viewpoint discrimination. Finally, the School District argues that if the Amended Use Policy results in viewpoint discrimination, that discrimination serves the compelling governmental interest of not violating the Establishment Clause....

First, the subject matter for which the Club sought access to the School District facilities already was included in the forum as evidence by the Scouts' speech....("[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." (emphasis added). When the district court analyzed whether the Scouts and Club were similarly situated, it determined that

> [a]lthough both the Club and the Scouting Program are concerned with the moral development of youth, the Club is fundamentally a Christian organization, the primary purpose of which is to instill and reinforce Christian faith and values in its members. The Scouts, by contrast, are a secular organization, the primary purpose of which is to develop skills and moral character not related to any religious faith....

...Thus, the "ideals of Scouting," which scout meetings seek to support, involve exactly the same category of speech for which the Club seeks access: moral and character development.

Further, the Amended Use Policy defines the scope of permissible speech from 3 to 6 p.m. by reference to the speech which may occur during the Scout meetings. The Scouts may engage, with the School District's blessing, in any speech relating to moral character and youth development....Because both the Club and the Scouts discuss issues relating to moral character and youth development, the subject matter for which the Club seeks access already is included under the Amended Use Policy.

Second, the Club has demonstrated that it has a viewpoint, i.e., a religious viewpoint, regarding moral character and youth development....Supreme Court held that denial of access to a religious group to show films regarding child-rearing and family values from a religious perspective constituted impermissible view point discrimination....

The Club need not establish that the school district opposed the Club's viewpoint: rather, the Club need only demonstrate that the Amended Use Policy allowed the Scouts to express their viewpoint on moral and character development but prohibited the Club's religious viewpoint. In Lamb's Chapel, the Supreme Court determined that the school access policy constituted impermissible viewpoint discrimination without any determination that the school officials opposed or disagreed with the religious perspective proposed....

In this case, the district court found that "the citizen comments and complaints about the Club were the primary factor leading to the School Board's examination of the 1986 Use Policy and eventual adoption of the Amended Use Policy."...We cannot say that the district court's finding that the primary reason that the School District adopted the Amended Use Policy was to exclude the Club from its premises from 3 to 6 p.m. on school days was clearly erroneous.

Even if we were to reject this finding as clearly erroneous, which we do not, the School District's viewpoint discrimination appears on the face of the Amended Use Policy. Specifically, the Amended Use Policy allows the Scouts access to the facilities so long as "such meetings shall be limited exclusively to the scout program and shall not include any speech or activity involving religion or religious beliefs."...Thus, like the utilization policy in Lamb's Chapel, the Amendment Use Policy restricts access to the facilities based on religious viewpoint....

Thus, we conclude that the Amended Use Policy results in viewpoint discrimination because it denies the Club access based on the Club's religious perspective on otherwise includible subject matter....

The School District argues, in the alternative, that viewpoint discrimination is justified because it serves the compelling governmental interest of avoiding an Establishment Clause violation....

The School District frames the issue as follows' [T]he Court must determine whether an adult initiated and led community group holding religious meetings in an elementary school from 3:00 to 4:00 p.m. on school days, while elementary students remain at school engaged in school sponsored activities, would be a violation of the Establishment Clause."...The School District's argument is, in a nutshell, that adoption of the Amended Use Policy was necessary to prevent an establishment of religion resulting from the 1986 Use Policy. Thus, we must determine whether the 1986 Use Policy created an impermissible establishment of religion.

Although much maligned, the Lemon test controls this court's analysis of whether government activity results in an impermissible establishment of religion. See Lemon v. Kurtzman....In order to satisfy the Lemon test, a challenged governmental action must (1) have a secular purpose, (2) not have the primary or principal effect of advancing religion, and (3) not foster an excessive entanglement with religion....

...We have little trouble concluding that opening the schools for expressive conduct to community and student groups serves the secular purpose of providing a forum for an exchange of ideas and social intercourse. Thus, the 1986 Use Policy satisfied the secular-purpose prong of Lemon...

...[T]he primary or principal effect of the 1986 Use Policy was not the advancement of religion; rather, the primary effect was to establish a neutral forum for community and student groups to engage in the exchange of ideas....

Finally, we turn to whether the 1986 Use Policy resulted in excessive entanglement with religion. The 1986 Use Policy results in no entanglement with religion because the School District need not distinguish among groups or monitor the community groups that utilize its facilities....

We conclude that the 1986 Use Policy had a secular purpose, did not have the primary effect of advancing religion, and did not result in impermissible entanglement with religion. Thus, the 1986 Use Policy did not result in an establishment of religion.

Adoption of the viewpoint discriminatory Amended Use Policy, therefore, did not serve a compelling governmental interest. Therefore, we hold that the Amended Use Policy violates the free speech clause of the First Amendment because it results in impermissible viewpoint discrimination.

Accordingly, we reverse the judgment of the district court....

A SCHOOL DISTRICT HAS NO CONSTITUTIONAL DUTY TO PROTECT STUDENTS FROM INJURIES CAUSED BY THIRD PARTIES AND, THEREFORE, IS NOT LIABLE IN SUCH CASES.

Graham v. Independent School District No. I-89
22 F 3d 991 (1994)

United States Court of Appeals, Tenth Circuit

JOHN P. MOORE, Circuit Judge.

In these cases, plaintiffs appeal the district court's dismissal of their civil rights complaints. Plaintiffs maintain defendant school districts breached their constitutional duty to protect students from the actions of third parties. We are poignantly aware of the seeming transformation of our public schools from institutions of learning into crucibles of disaffection marred by increasing violence from which anguish and despair are often brought to homes across the nation. Yet, defendant school districts neither entered into a custodial relationship with their students, nor did they create or augment the danger posed by the aggressors. Therefore, as the law unquestionably mandates, we affirm the district court's orders dismissing plaintiffs' claims.

Plaintiff Ladonna J. Graham brought suit under 42 U.S.C. section 1983 against defendant Independent School District no. I-89. She alleges another student shot and killed her son, Charles William Graham, Jr., while he was in defendant's care and custody. Maintaining school district employees had received warnings that a student who had threatened violence against Charles was on school grounds with a gun, plaintiff asserts the failure of defendant to react to this known threat violated the Due Process Clause of the Fourteenth Amendment.

Plaintiff Paula Pointer also brings a Fourteenth Amendment claim under section 1983. Ms. Pointer's son, Benjamin P. Pointer, was stabbed while on school premises. Plaintiff Pointer alleges defendant Western Heights Independent School District knew or should have known of the danger to her son but failed to take action to secure his safety.

In both cases, defendant school districts filed...motions to dismiss. Finding Supreme Court and Tenth Circuit precedent controlling, the district court dismissed the constitutional claims without leave to amend....Plaintiffs appeal the trial court's dismissals, arguing the quasi-custodial nature of the public schools coupled with defendants' knowledge of a specific threat of harm gives rise to a cognizable constitutional claim under the Fourteenth Amendment....

Plaintiffs' allegations are straightforward and concise. They aver defendants knew that Charles Graham and Benjamin Pointer were in danger of being harmed by their fellow students but failed to take appropriate measures. Thus, plaintiffs contend the school districts had an affirmative constitutional duty to protect the students not only from the actions of the State and its agents, but also from the danger posed by unrelated third parties.

In deciding whether the plaintiffs have pled a cognizable claim, we must determine whether they can allege the deprivation of a constitutional right....

In *DeShaney*, the Wisconsin Department of Social Services received several reports that a four-year old boy, Joshua, was suffering abuse at the hands of his father. Despite these reports, the State filed to remove Joshua from his father's custody. Eventually, Joshua's father struck him so severely the boy suffered permanent brain damage. Joshua and his mother brought suit, alleging the State had violated the Fourteenth Amendment by failing to intervene on his behalf.

Holding that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty and property of its citizens against invasion by private actors," the Supreme Court flatly rejected plaintiff's argument....However, the *DeShaney* Court fashioned a narrow exception to this general rule, holding a duty of protection may arise when the State imposes limitations upon an individual to act on his or her own behalf....

Accordingly, if "the State takes a person into its custody and holds him there against his will," it also assumes some measure of a constitutionally-mandated duty of protection. *DeShaney*....The Court indicated either institutionalization or incarceration will trigger this duty....

Following *DeShaney*, this court examined the custodial nature of compulsory school attendance laws....[T]he *Maldonado* court concluded "compulsory attendance laws do not create an affirmative constitutional duty to protect students from the private actions of third parties while they attend school."...

Thus, we have clearly held compulsory school attendance laws do not spawn an affirmative duty to protect under the Fourteenth Amendment. Nonetheless, plaintiffs urge *Maldonado*'s holding does not foreclose the existence of a constitutional tort where a student is the victim of a *foreseeable* assault. Arguing the school had knowledge of the violent propensities of one of its students, plaintiffs maintain this knowledge, coupled with the quasi-custodial nature of school attendance, satisfied the standards articulated in *DeShaney.*

We hold foreseeability cannot create an affirmative duty to protect when plaintiff remains unable to allege a custodial relationship....We are thus constrained to conclude because no special relationship existed between the plaintiffs and defendants, defendants' alleged nonfeasance in the face of specific information which would mandate action does not invoke the protections of the Due Process Clause. "Inaction by the state in the face of a known danger is not enough to trigger the obligation; according to DeShaney the state must have limited in some way the liberty of a citizen to act on his own behalf."...In the absence of a custodial relationship, we believe plaintiffs cannot state a constitutional claim based upon the defendants' alleged knowledge of dangerous circumstances.

...Many courts have noted that "DeShaney...leaves the door open for liability in situations or renders citizens more vulnerable to danger."...This state-created danger doctrine "necessarily involves affirmative conduct on the part of the state in placing the plaintiff in danger."...Because plaintiffs cannot point to an affirmative action by the defendants that created or increased the danger to the victims, this argument must also fail.

Contrary to plaintiffs' suggestion at oral argument, defendants did not create a hazardous situation by placing the aggressor and victim in the same location. Notwithstanding defendants' specific knowledge of the propensities of the aggressors, any danger to the victims was "too remote a consequence of [defendants'] action to hold them responsible under the federal civil rights law."...

AFFIRMED.

A SHARED TIME PROGRAM FOR STUDENTS ATTENDING A RELIGIOUS SCHOOL WHERE THE INSTRUCTORS ARE PAID BY THE STATE ADVANCES A RELIGION AND IS UNCONSTITUTIONAL.

School District of City of Grand Rapids v. Ball
105 SCt 3216 (1985)

Supreme Court of the United States

JUSTICE BRENNAN delivered the opinion of the Court.

The School District of Grand Rapids, Michigan, adopted two programs in which classes for nonpublic school students are financed by the public school system, taught by teachers hired by the public school system, and conducted in "leased" classrooms in the nonpublic schools. Most of the nonpublic schools involved in the programs are sectarian religious schools. This case raises the question whether these programs impermissibly involve the government in the support of sectarian religious activities and thus violate the Establishment Clause of the First Amendment.
...

The Shared Time program offers classes during the regular school day that are intended to be supplementary to the "core curriculum" courses that the State of Michigan requires as a part of an accredited school program. Among the subjects offered are "remedial" and "enrichment" mathematics, "remedial" and "enrichment" reading, art, music and physical education. A typical nonpublic school student attends these classes for one or two class periods per week; approximately "ten percent of any given nonpublic school student's time during the academic year would consist of Shared Time instruction." Although Shared Time itself is a program offered only in the nonpublic schools, there was testimony that the courses included in that program are offered, albeit perhaps in a somewhat different form, in the public schools as well. All of the classes that are the subject of this case are taught in elementary schools, with the exception of Math Topics, a remedial math course taught in the secondary schools.

The Shared Time teachers are full-time employees of the public schools, who often move from classroom to classroom during the course of the school day. A "significant portion" of the teachers (approximately 10%) "previously taught in nonpublic schools, and many of those had been assigned to the same nonpublic school where they were previously employed."...

The classes at issue here are taught in the nonpublic elementary schools and commence at the conclusion of the regular school day....The District Court found that "[a]lthough certain Community Education courses offered at nonpublic school sites are not offered at the public schools on a Community Education basis, all Community Education programs are otherwise available at the public schools, usually as a part of their more extensive regular curriculum."

..."Virtually every Community Education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school."...

Each room used in the programs has to be free of any crucifix, religious symbol, or artifact, although such religious symbols can be present in the adjoining hallways, corridors, and other facilities used in connection with the program....

Although petitioners label the Shared Time and Community Education students as "part-time public school students," the students attending Shared Time and Community Education courses in facilities leased from a nonpublic school are the same students who attend that particular school otherwise. There is no evidence that any public school student has ever attended a Shared Time or Community Education class in a nonpublic school....Thus, "beneficiaries are wholly designated on the basis of religion" and these "public school" classes, in contrast to ordinary public school classes which are largely neighborhood-based, are as segregated by religious as are the schools at which they are offered.

Forty of the forty-one schools at which the programs operate are sectarian in character....

The First Amendment's guarantee that "Congress shall make no law respecting an establishment of religion," as our cases demonstrate, is more than a pledge that no single religion will be designated as a state religion. It is also more than a mere injunction that government programs discriminating among religious are unconstitutional. The Establishment Clause instead primarily proscribed "sponsorship, financial support, and active involvement of the sovereign in religious activity." "Neither [a State nor the Federal Government] can pass laws which aid one religion, aid all religions, or prefer one religion over another."...

We have noted that the three-part test articulated in *Lemon v. Kurtzman* guides "[t]he general nature of our inquiry in this area."...We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children....The *Lemon* test concentrates attention on the issues--purposes, effect, entanglement--that determine whether a particular state action is an improper "law respecting an establishment of religion." We therefore reaffirm that state action alleged to violate the Establishment Clause should be measured against the *Lemon* criteria....

Our inquiry [for the second test] must begin with a consideration of the nature of the institutions in which the programs operate. Of the 41 private schools where these "part-time public schools" have operated, 40 are identifiably religious schools....The District Court found...that "[b]ased upon the massive testimony and exhibits, the conclusion is inescapable that the religious institutions receiving instructional services from the public schools are sectarian in the sense that a substantial portion of their functions are subsumed in the religious mission." At the religious schools here--as at the sectarian schools that have been the subject of our past cases--"the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. With that institution, the two are inextricably intertwined."...

Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause does absolutely prohibit government-financed or government-sponsored indoctrination in the beliefs of a particular religious faith....

In Meek...the court invalidated a statute providing for the loan of state-paid professional staff--including teachers--to nonpublic schools to provide remedial and accelerated instruction, guidance counseling and testing, and other services on the premises of the nonpublic schools. Such a program...would entail an unacceptable risk that the state-sponsored instructional personnel would "advance the religious mission of the church-related schools...."...

The programs before us today share the defect that we identified in Meek. With respect to the Community Education Program, the District Court found that "virtually very Community Education course conducted on facilities leased from nonpublic schools has an instructor otherwise employed full time by the same nonpublic school."...Community Education classes are not specifically monitored for religious content.

We do not question that the dedicated and professional religious school teachers employed by the Community Education program will attempt in good faith to perform their secular mission conscientiously. Nonetheless, there is a substantial risk that, overtly or subtly, the religious message they are expected to convey during the regular school day will infuse the supposedly secular classes they teach after school. The danger arises "not because the public employee [is] likely deliberately to subvert his task to the service of religion, but rather because the pressures of the environment might alter his behavior from its normal course."...

The Shared Time program, though structured somewhat differently, nonetheless also poses a substantial risk of state-sponsored indoctrination. The most important difference between the programs is that most of the instructors in the Shared Time program are full-time teachers hired by the public schools....

...Our holding in Meek controls the inquiry with respect to Shared Time, as well as Community Education. Shared Time instructors are teaching academic subjects in religious schools in courses virtually indistinguishable from the other courses offered during the regular religious-school day. The teachers in this program, even more than their Community Education colleagues, are "performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained."...

Our cases have recognized that the Establishment Clause guards against more than direct, state-funded efforts to indoctrinate youngsters in specific religious beliefs. Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any--or all--religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated....

It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices....The symbolism of a union between church and state is more likely to influence children of tender years, whose experience is limited and whose beliefs are the function of environment as much as of free and voluntary choice....

In the programs challenged in this case, the religious school students spend their typical school day moving between religious-school and "public-school" classes. Both types of classes take place in the same religious-school building and both are largely composed of students who are adherent of the same denomination. In this environment, the students would be unlikely to discern the crucial difference between the religious-school classes and the "public-school" classes, even if the latter were successfully kept free of religious indoctrination. ...

...The programs challenged here, which provide teachers in addition to the instructional equipment and materials, have a ...forbidden effect of advancing religion. This kind of direct aid to the educational function of the religious school is indistinguishable from the provision of a direct cash subsidy to the religious school that is most clearly prohibited under the Establishment Clause....

We conclude that the challenged programs have the effect of promoting religion in three ways. The state-paid instructors, influenced by the pervasively sectarian nature of the religious schools in which they work, may subtly or overly indoctrinate the students in particular religious tenets at public expense. The symbolic union of church and state inherent in the provision of secular, state-provided instruction in the religious school buildings threatens to convey a message of state support for religion to students and to the general public. Finally, the programs in effect subsidize the religious functions of the parochial schools by taking over a substantial portion of their responsibility for teaching secular subjects. For these reasons, the conclusion is inescapable that the Community Education and Shared Time programs have the "primary or principal" effect of advancing religion, and therefore violate the dictates of the Establishment Clause of the First Amendment....

[The decision was affirmed.]

WHERE THERE IS NO SHOWING A PRINCIPAL COULD HAVE FORESEEN THAT THE COACH WOULD HAVE SEXUAL CONTACT WITH HIS MALE ATHLETES AND NO SHOWING THE PRINCIPAL WAS DELIBERATELY INDIFFERENT TO COMPLAINING STUDENTS' RIGHTS, THERE IS NO LIABILITY UNDER SECTION 1983.

Hagan v. Houston Independent School District
51 F 3d 48 (1995)

United States Court of Appeals, Fifth Circuit

W. EUGENE DAVIS, Circuit Judge:

Plaintiffs-Appellees in this case are three former students of Wheatley High School (WHS) in Houston, Texas, and their mothers. These students allege that they were sexually molested by their former high school coach, Tommy Reaux. The students and their mothers filed suit against several defendants, including the principal of WHS, Eddie Orum, III, for failing to prevent Reaux's abuse. Orum now appeals the district court's denial of his motion for summary judgment based on qualified immunity. We reverse....

On September 12, 1989, Appellee Roland Major informed several WHS teachers that Reaux had pinched and patted him on the buttocks. One of these teachers send Major to Appellant Orum, who interviewed Major and had him make a written statement. Orum then met with Reaux, who admitted that he had patted Major on the behind. Reaux told Orum that he had been trying to persuade Major to rejoin the football team and that the pat had simply been a "coaches' gesture." That same day, Orum met with Major and Reaux together. At this meeting, Orum told Major that because there were no witnesses to the incident, nothing further could be done....

On October 25, 1989, Appellee Cleveland McCord reported to several teachers that he had been having sexual relations with Reaux. One of these teachers took him to speak to Orum. Orum met separately with McCord and with Reaux, then met with them together. In Reaux's presence, Orum had McCord make a written statement. Orum also separately questioned Reaux, who denied McCord's allegations. Later that day, Orum tried to telephone McCord's mother, but could not reach her because the telephone number was either disconnected or incorrect. Orum contacted an official with the Houston Independent School District (HISD) and relayed the information McCord had given him. The HISD instructed Orum to get statements from McCord and Reaux and to prepare a written report. The HISD also told Orum that William Morgan, the HISD District IX Superintendent, would begin an investigation. Orum sent a written report to the HISD that day....

...On November 1, Orum went to McCord's home to speak to his mother. Orum informed McCord's mother of McCord's allegations and told her that he had spoken with both McCord and Reaux. Orum also told McCord's mother that Reaux would no longer be allowed to be alone with students. This was apparently the first that McCord's mother had heard of this matter and she told Orum to hold off his investigation because she wanted to speak to her son first. The next morning, McCord's mother visited Orum's office, informed Orum that the relationship between Reaux and her son had been consensual and asked Orum to stop investigating. On that day, Orum wrote to Morgan and informed him that his investigation had been inconclusive and that he planned to end his inquiry unless he was instructed otherwise.

Some time in 1990, Orum was approached by Daphne Chappell, the band teacher at WHS, who suggested that he speak with a student named Earl Armstrong to see if Armstrong had been having problems with Reaux. Chappell told Orum that Armstrong's youngest brother had said that Reaux and Armstrong were having sexual relations. Orum spoke to Armstrong and to Reaux, both of whom denied the allegations. Orum also spoke to Armstrong's mother, who told him only that she was concerned that the WHS football and band departments were too aggressively vying for Armstrong's exclusive participation. At this time, Orum believed that some of the past allegations against Reaux might have been true, but because of the outcome of his interviews with Armstrong, Armstrong's mother and Reaux, Orum concluded that he should take no further action.

Although Orum was aware that a number of alumni and faculty were discussing Reaux and insisting that he be fired, he was not notified of any new concrete complaint about Reaux until 1991. On April 23, 1991, appellant Lee Douglas Hagan reported to the campus police, several teachers and Orum that Reaux had rubbed his inner thigh, grabbed his penis through his pants and made a number of suggestive comments while Hagan was in the WHS coaches' office. After the District Attorney's Office brought formal charges against him, Reaux was removed from his position at WHS.

In their suit in federal court, the students brought claims under 42 U.S.C. section 1983 alleging violations of their civil rights....

This court recently explained that "a supervisory school official can be held personally liable for a subordinate's violation of an elementary or secondary school student's constitutional right to bodily integrity in physical sexual abuse cases if the plaintiff establishes that:

> 1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student; and
> 2) the defendant demonstrated deliberate indifference toward the constitutional rights of the student by

> failing to take action that was obviously necessary to prevent or stop the abuse; and
> 3) such failure caused a constitutional injury to the student." Taylor...

Orum contents that the students have not shown that they suffered a deprivation of their constitutional right to bodily integrity and that the students failed to meet every prong of the Taylor test. We do not address whether the students have shown constitutional violations because even if they have, we conclude that the standard established in Taylor, Orum is entitled to qualified immunity.

1. Major

To avoid Orum's qualified immunity defense, Major must show that (1) Orum had learned of facts that pointed plainly toward a conclusion that Reaux had been molesting students; and (2) in the fact of that knowledge, Orum failed to take clearly necessary steps to prevent Reaux's abuse of Major. This is a difficult task for Major, who was the first to report to Orum any sexual misconduct by Reaux....Because Orum had no information that Reaux posed a threat to students, he could not have been deliberately indifferent.

2. McCord

McCord attempts to satisfy the first prong of the Taylor standard by arguing that Major's complaint put Orum on notice that Reaux was sexually molesting students. McCord contends that after Major's complaint, Orum failed to take steps that were obviously necessary to prevent Reaux's later abuse of McCord, manifesting deliberate indifference....[G]iven the nature of Major's complaint, Orum's response was hardly indifferent. Orum interviewed both Major and Reaux and warned Reaux to monitor the gestures he made with students. Orum also knew that Reaux had gone to Major's home to discuss the incident with Major's mother and had heard nothing further from either Major or his mother. Orum's decision that no further action on Major's complaint was warranted was not a failure to take steps that were obviously necessary to avert harm to potential future victims. McCord also does not suggest that his sexual relationship with Reaux continued after he went to Orum, so Orum's action or inaction in response to McCord's complaint cannot have been the cause of an injury to McCord....Orum's actions after McCord's complaint were also not deliberately indifferent.

3. Hagan

After the complaint by McCord and the rumors about Armstrong, Orum had undoubtedly learned of facts or a pattern of behavior that pointed plainly toward the conclusion that Reaux was engaging in sexual activity with WHS students. It is also obvious that the action Orum took in response to this information was ineffective to prevent Reaux's subsequent mistreatment of Hagan. However, simple ineffectiveness is not enough to overcome qualified immunity. Taylor...

Orum took more than a minimal amount of action in response to the complaints he received. He interviewed McCord, Armstrong, both their mothers, Reaux, and other involved faculty members. Orum was given inconsistent information by McCord, then was told by McCord's mother that her son's relationship with Reaux was consensual and that Orum should drop his investigation. Nonetheless, Orum warned Reaux that Orum would recommend Reaux's termination if there was reason to suspect that he had taken part in even a consensual sexual relationship with McCord. When Orum questioned Armstrong, Armstrong denied any sexual relationship with Reaux; Orum spoke to Armstrong's mother anyway. Orum was not told by Armstrong's mother that she was suspicious that Armstrong had an inappropriate intimate relationship with Reaux....Orum documented his investigations, reported his findings to his superiors and requested further direction. While the students point to extra precautions Orum could have taken that might have pre-empted Reaux from grabbing Hagan, they have not established that Orum did so little that he was deliberately indifferent....

The students place a great deal of emphasis on the undisputed facts that Orum did not follow some of the procedures established in the HISD Handbook for Principals, which recommends steps a principal should take when a student reports a "sexual offense."...Orum's failure to precisely follow the Handbook does not itself establish that Orum was deliberately indifferent. After a careful review of the summary judgment evident, we conclude that there is no genuine dispute of material fact over whether Orum was deliberately indifferent to Reaux's abuse of these students....

For the reasons given above, we REVERSE the district court's denial of Orum's Motion for Summary Judgment....

A SCHOOL BOARD HAS NO DUTY TO WARN A FEMALE STUDENT OF OBVIOUS DANGERS OF PARTICIPATION IN VARSITY FOOTBALL.

Hammond v. Board of Education of Carroll County
639 A 2d 223 (1994)

Court of Special Appeals of Maryland

MOTZ, Judge.

On August 25, 1989, appellant, Tawana Hammond, the first female high school football player in Carroll County history, was injured in her team's initial scrimmage. Three years later, Tawana and her mother, appellant Peggy Hammond, (collectively, the Hammonds) filed suit in the Circuit Court of Carroll County against appellee, the Board of Education of Carroll County (the Board), seeking $1.25 million in compensatory damages. The Hammonds asserted (1) that the high school authorities negligently failed to warn them of the potential risk of injury inherent in playing football and (2) that if they had been so warned Tawana would not have chosen to play football and her mother would not have permitted her to do so. After the parties conducted discovery, the Board moved for summary judgment, which the circuit court (Beck, J.) granted.

The record reveals that the underlying material facts are not disputed. Sixteen-year-old Tawana tried out for the Francis Scott Key High School varsity football team in the summer of 1989, prior to the beginning of her junior year in high school. Although Tawana had previously participated in a number of track events and played softball and soccer, she had never engaged in any contact sports. Tawana had watched football on television since she was six years old but did not become interested in football until her freshman year in high school; she had never observed any "really serious" injuries in these televised games, only a "twisted ankle or something." She saw a half dozen high school games during her freshman and sophomore years and saw no players hurt at those games. Tawana knew football was a "physical contact sport" and determined she wanted to play it because "[i]t was different."

In order for a student to play sports at Francis Scott Key High School, the student and the student's parent must sign a document entitled "Francis Scott Key High School Athletic Regulations and Permission Form." Both Tawana and her father, John Hammond (not a party herein), signed this form on June 18, 1989. The permission form states that the student has read the school handbook and regulations and agrees to abide by them and that the parent has read them and "consents" to the child's participation in the sport. One sentence in the permission form specifically states that "[w]e do our very best to avoid accidents, but we realize that in the normal course of events, some occur." In deposition, Tawana testified that she read the permission form and, in particular, this sentence before she started playing football and understood that she "could get a broken leg, [or] broken arm" as a result of playing varsity, tackle football.

The permission form also requires that "[e]ach participating athlete must have a special examination" by the family physician and "must be found physically fit" and "must also have parent/guardian permission to participate." Tawana submitted the required "Carroll County Public School Athletic Participation Health Examination Form" signed by her doctor on July 31, 1989; in it her doctor certified that she was "physically able" to compete in a list of sports, including football. Moreover, on that same date Tawana's mother, a certified nurse's aide, whose older son played football at Francis Scott Key High School until "he sprained his leg," signed the participation form. On that form, Ms. Hammond gave her "consent" for Tawana to play the several sports listed, including football. Ms. Hammond acknowledged in deposition that "injury was [her] biggest fear" for Tawana, i.e., "like [a] broken leg, [or] broken arms," but that she never communicated her fears to Tawana and believed Tawana "should be allowed to do whatever it was she wanted to do."

Throughout the summer of 1989, Tawana participated in the team's weight lifting program along with the other varsity football players. She was happy with the progress that she was making in her strength training and had no concerns or fears that she would not be physically strong enough to compete on the playing field. Practice began in August. On the first day of practice, which involved some contact drills, Tawana, along with the rest of the team, was instructed by the head coach, not to tackle, block or "do anything" with the neck because "you could get a neck injury." After the first practice, a meeting was conducted for the parents of the players. Tawana and both of her parents attended that meeting, at which an official gave a presentation discussing the possibility of serious injury to the neck if the head were used for blocking or tackling.

As practices continued, Tawana, had no difficulty in keeping up physically with the other players on the team. On August 25, 1989, Tawana, along with the rest of the Francis Scott Key High School varsity football team, travelled to Anne Arundel County for the team's first practice scrimmage. Prior to the scrimmage, Tawana was interviewed by a television reported and stated that "[p]laying football is a tough sport. I do have to admit that." During the scrimmage, while carrying the ball, Tawana was tackled by a rival player and sustained multiple internal injuries including a ruptured spleen. Her spleen and part of her pancreas were removed, and she was hospitalized for some time.

On August 13, 1992, Tawana and her mother filed this suit.

The circuit court granted summary judgment to the Board, concluding that (a) it had no duty to warn "of the risk of serious, disabling and catastrophic injury associated with playing on a high-school-varsity tackle, football team;" (b) if there was a duty to warn the Hammonds it was satisfied; and (c) Tawana and her mother assumed the risk of injury as a matter of law....

The central theory espoused by the Hammonds, that the school board had a duty to warn them of the severe injuries that might result from voluntarily participating on a varsity high school tackle football team, is one that, as far as we can determine, has never been adopted by any court in this country....

...The "general rule is that participants in an athletic contest accept the normal physical contact of the particular sport."...Absent evidence of "mental deficiency," and there is no claim that Tawana is not at least of average intelligence, minors are held to "sufficiently appreciate[] the dangers inherent in the game of football," Whipple...to know that "football is a rough and hazardous game and that anyone playing or practicing such a game may be injured," Hale...and that "[f]atigue, and unfortunately, injury are inherent in team competitive sports, especially football." Benitez...Thus, it is "common knowledge that children participating in games...may injure themselves and ...no amount of supervision...will avoid some such injuries, and the law does not make a school the insurer of the safety of pupils at play."...As the Supreme Court of Oregon explained in rejecting a similar claim by a fifteen-year-old injured in a football game,

> The playing of football is a body-contact sport. The game demands that the players come into physical contact with each other constantly, frequently with great force...the ball-carrier...must be prepared to strike the ground violently. Body contacts, bruises, and clashes are inherent in the game. There is no other way to play it. No prospective player need be told that a participant in the game of football may sustain injury. That fact is self evident....

For these reasons, courts have been extremely inhospitable to claims that properly equipped, injured high school players should be able to recover from school officials for injuries sustained during an ordinary, voluntary contact sport game. Thus, in the vast majority of such cases, it has been held that those asserting such claims cannot recover as a matter of law....

The Hammonds largely ignore the above authority. Instead, they heavily rely on Eisel....In Eisel, it was asserted that the school officials had actual knowledge that a pupil intended to commit suicide, knowledge that the child's parents did not have. The Board here had no actual knowledge of any impending harm to Tawana, let alone any impending intentional harm. If the Board had learned that Tawana intended to injure herself or that a rival player intended to injure or illegally hit her, then it, like the authorities in Eisel, well might have had a duty to warn Tawana and her parents. The Hammonds, however, do not even suggest that the Board had such knowledge or, indeed, that Tawana was injured because of some intentional act. Eisel is inapposite. It does not in any way undercut the fundamental principle that there is no duty to warn of obvious risks.

That principle is well established in Maryland. The Court of Appeals explained more than twenty-five years ago that when a pleading alleges a danger that is "ordinary and obvious," it has not sufficiently alleged "circumstances which would require the defendants to give a warning....

In light of our conclusion that the Board had no duty to warn the Hammonds, we need not reach the question of whether Tawana assumed the risk as a matter of law. We do note, however, that there is case law supporting the circuit court's conclusion that she did....

Although she has not stated a cause of action against the Board, Tawana's injuries were serious, painful, and permanent. We regret them and sympathize with her. Our holding here, that school officials have no duty to warn a student or the student's parents that serious injury might result from the student's voluntary participation on a high school varsity tackle football team, does not mean that such a warning would not be a sound idea as a matter of public policy....In view of the very serious injuries suffered by Tawana, school officials may well want to consider issuing a warning of the possibilities of such injuries--even though there is no legal obligation to do so.

JUDGMENT AFFIRMED.

STUDENT-LED GRADUATION PRAYER IS DISTRICT CONTROLLED AND VIOLATES THE ESTABLISHMENT CLAUSE

Harris v. Joint School Dist. No. 241
41 F 3d 447 (1994)

United States Court of Appeals, Ninth Circuit

WIGGINS, Circuit Judge...

In this case, students and a parent of students challenge the constitutionality of the inclusion of prayer in the Grangeville High School graduation ceremony held yearly in Grangeville, Idaho. The plaintiffs claim that the prayers violate Article IX, sections 5 and 6, and Article I, section 4, of the Idaho Constitution (the Idaho Religion Clauses"), and the Establishment Clause of the United States Constitution....The district court declined to rule on the state law issues, held that the prayers did not violate the Establishment Clause, and entered judgment for the defendants....

The plaintiffs contend that the district court erred in holding that the prayers did not violate the Establishment Clause. The Supreme Court recently addressed, in Lee v. Weisman...whether a prayer said at a high school graduation ceremony violated the Establishment Clause.

In Lee, the principal of the high school invited Rabbi Leslie Gutterman to deliver prayers at the Nathan Bishop Middle School graduation. The principal gave the Rabbi a pamphlet, prepared by an organization of Christians and Jews, recommending what kinds of prayers should be given at civic ceremonies. The principal also advised the Rabbi that the prayers should be nonsectarian. The Rabbi's prayers were nonsectarian yet squarely in line with Judeo-Christian tradition. The graduation ceremony took place on school property. Attendance was stipulated by the parties to be voluntary....The Court held that the prayers violated the Establishment Clause....[T]he Court reasoned that direction by state officials created a "potential for divisiveness" over religion....The Court also noted that whether attendance at high school graduation could be called "voluntary" or not was irrelevant. High school graduation is an extremely important event, important enough that "to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme."...

This court has also addressed the practice of praying at high school assemblies. Collins...We held that these prayers violated the Establishment Clause, citing the "three part test enunciated in Lemon v. Kurtzman."...That test establishes that a state regulation does not violate the Establishment Clause if (1) the enactment has a secular purpose; (2) its principal or primary effect neither advances nor inhibits religion; and (3) it does not foster an excessive entanglement with religion."...

We also held that there was "no meaningful distinction between school authorities actually organizing the religious activity and officials merely 'permitting' students to direct the exercises."...

We examine the facts of this case against the background of Lee and Collins. Grangeville High has had an invocation and a benediction at high school graduation since 1981 or earlier. Grangeville High's graduation is in many if not most respects like the graduation at issue in Lee....

The school district contends, however, and the district court found, that the facts in this case differ from Lee in a manner that makes Lee inapposite. The school district has taken a number of steps to distance itself from the decisions whether to have a prayer, who to select to say it, and how it is to be said. Essentially, the school district claims that the Grangeville High senior class, as a group, by majority vote, have made these decisions and otherwise planned the graduation program without interference from school officials.

In November 1990, School District Superintendent Al Arnzen sent a memo to all principals regarding prayer at graduation ceremonies. The memo states:

> I just want to make sure we are all doing the same thing for Invocation and Benediction at graduation. The school board is permitting...and not requiring Invocation and Benediction at Graduation....

...The memo "did not change existing policy, but simply reinforced" prior practice....However, from 1991 forward, students were given written ballots for the prayer poll, whereas before a hand vote was taken....

The Court in Lee noted two facts that marked and controlled its decision: (1) state involvement and (2) the obligatory nature of the students' participation in the religious activity taking place at graduation. The District argues that the first controlling fact of the Lee decision, state involvement, is absent in this case. The district claims that the involvement of the seniors in place of the school district is sufficient to distinguish Lee and shield the prayers from the reach of the Establishment Clause....

We are not persuaded....In this case, we find present both of the factors relied on by the Court in Lee....

For several reasons, we find state involvement in this case pervasive enough to offend the Establishment Clause concerns. First, the school ultimately controls the event....Significantly, all of the parties in this case agree that the seniors have authority to make decisions regarding graduation only because the school allows them to have it. No party has argued that high school seniors, as a class, have an exclusive right to direct their high school graduation by majority vote. To the contrary, the parties appear to agree, as we do, with what Superintendent Arnzen said was a fair characterization of graduation: "[T]he graduation ceremony is the presentation by the school of diplomas representing graduation certificates to the people who have fulfilled the requirements of the high school for graduation." (Emphasis supplied.)

Second, the school underwrites the event. The school offers to the senior class, at no cost, the building and other expenses. Even the commencement programs are paid for in part with money the senior class is allotted from student registration funds. The graduation is attended and approved of by school officials. School officials encourage the senior class officers to prepare graduation and give them some control over the program in order to encourage leadership.

Given that graduation is ultimately a school-controlled, school-sponsored event, there appears in this case to be just as much state involvement as appeared in Collins....

We held in Collins that the fact that students set the assembly agenda and make decisions as to whether a prayer shall occur, who shall say it, and how it shall be said is insufficient to distance school officials from what would otherwise be an Establishment Clause violation. We found "no meaningful distinction" between school officials acting directly and school officials "merely permitting students to direct the exercise." ...Under Collins, therefore, whether school officials make the decisions or give their authority to decide to another, the ultimate responsibility for those decisions is borne by school officials. Applied in this case, Collins requires us to find that involvement sufficient to violate the Establishment Clause....

The school purportedly gave seniors this chance to plan graduation in order to teach them leadership. If so, then it can teach them the responsibilities that go with such leadership, one of which is to respect the constitutional rights of others....

REMOVAL OF ARTICLES FROM THE SCHOOL NEWSPAPER BY THE PRINCIPAL IS A CURRICULAR MATTER AND DOES NOT VIOLATE CONSTITUTIONAL PROVISION FOR FREE SPEECH.

Hazelwood School District v. Kuhlmeier
108 SCt 562 (1988)

Supreme Court of the United States

JUSTICE WHITE delivered the opinion of the Court.

This case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.

Petitioners are the Hazelwood School District in St. Louis County, Missouri; various school officials;...Respondents are three former Hazelwood East students who were staff members of Spectrum, the school newspaper. They contend that school officials violated their First Amendment rights by deleting two pages of articles from the May 13, 1983, issue of Spectrum.

Spectrum was written and edited by the Journalism II class at Hazelwood East. The newspaper was published every three weeks or so during the 1982-1983 school year. More than 4,500 copies of the newspaper were distributed during that year to students, school personnel, and members of the community.

The Board of Education allocated funds from its annual budget for the printing of Spectrum. These funds were supplemented by proceeds from sales of the newspaper....

We have...recognized that the First Amendment rights of students in public schools "are not automatically coextensive with the rights of adults in other settings," and must be "applied in light of the special characteristics of the school environment." A school need not tolerate student speech that is inconsistent with its "basic educational mission," even though the government could not censor similar speech outside the school....It is in this context that respondents' First Amendment claims must be considered.

We deal first with the question whether Spectrum may appropriately be characterized as a forum for public expression. The public schools do not possess all the attributes of streets, parks, and other traditional public forums that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."...Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public,"...or by some segment of the public, such as student organizations....If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."...

The policy of school officials toward Spectrum was reflected in Hazelwood School Board Policy...and the Hazelwood East Curriculum Guide. Board Policy...provided that "school sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities."...The Hazelwood East Curriculum Guide described the Journalism II course as a "laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I." The lessons that were to be learned from the Journalism II course, according to the Curriculum Guide, included development of journalistic skills under deadline pressure, "the legal, moral, and ethical restrictions imposed upon journalists within the school community," and "responsibility and acceptance of criticism for articles of opinion." Journalism II was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course.

School officials did not deviate in practice from their policy that production of Spectrum was to be part of the educational curriculum and a "regular classroom activit[y]." The District Court found that Robert Stergos, the journalism teacher during most of the 1982-1983 school year, "both had the authority to exercise and in fact exercised a great deal of control over Spectrum."...For example, Stergos selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company. Many of these decisions were made with consultation with the Journalism II students. The District Court thus found it "clear that Mr. Stergos was the final authority with respect to almost every aspect of the production and publication of Spectrum, including its content." Moreover, after each Spectrum issue had been finally approved by Stergos or his successor, [Emerson,] the issue still had to be reviewed by Principal Reynolds prior to publication....

...School officials did not evince either "by policy or by practice" any intent to open the pages of Spectrum to indiscriminate use" by its student reporters and editors, or by the student body generally. Instead, they "reserve[d] the forum for its intended purpos[e]" as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of Spectrum in any reasonable manner. It is this standard, rather than our decision in Tinker v. Des Moines Independent Community School Dist., that governs this case.

The question whether the First Amendment requires a school to tolerate particular student speech--the question that we addressed in Tinker--is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence a school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself,"...not only from speech that would "substantially interfere with [its] work...or impinge upon the rights of other students,"...but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices--standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world--and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order,"...or to associate the school with any position other than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."...

Accordingly, we conclude that the standard articulated in Tinker for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges....It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid education purpose that the First Amendment is so "directly and sharply implicate[d]," as to require judicial intervention to protect students' constitutional rights.

We also conclude that Principal Reynolds acted reasonably in requiring the deletion from the May 13 issue of Spectrum of the pregnancy article, the divorce article and the remaining articles that were to appear on the same pages of the newspaper.

The initial paragraph of the pregnancy article declared that "[a]ll names have been changed to keep the identity of these girls a secret." The principal concluded that the students' anonymity was not adequately protected, however, given the other identifying information in the article and the small number of pregnant students at the school. Indeed, a teacher at the school credibly testified that she could positively identify at least one of the girls and possibly all three. It is likely that many students at Hazelwood East would have been at least as successful in identifying the girls. Reynolds therefore could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students. In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents, who were discussed in the article but who were given no opportunity to consent to its publication or to offer a response. The article did not contain graphic accounts of sexual activity. The girls did comment in the article, however, concerning their sexual histories and their use or nonuse of birth control. It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters.

The student who was quoted by name in the version of the divorce article seen by Principal Reynolds made comments sharply critical of her father. The principal could reasonably have concluded that an individual publicly identified as an inattentive parent--indeed, as one who chose "playing cards with the guys" over home and family--was entitled to an opportunity to defend himself as a matter of journalistic fairness. These concerns were shared by both of Spectrum's faculty advisers for the 1982-1983 school year, who testified that they would not have allowed the article to be printed without deletion of the student's name.

Principal Reynolds testified credibly at trial that, at the time that he reviewed the proofs of the May 13 issue during an extended telephone conversation with Emerson, he believed that there was no time to make any changes in the articles, and that the newspaper had to be printed immediately or not at all. It is true that Reynolds did not verify whether the necessary modifications could still have been made in the articles, and that Emerson did not volunteer the information that printing could be delayed until the changes were made. We nonetheless agree with the District Court that the decision to excise the two pages containing the problematic articles was reasonable given the particular circumstances of this case. These circumstances included the very recent replacement of Stergos by Emerson, who may not have been entirely familiar with Spectrum editorial and production procedures, and the pressure felt by Reynolds to make an immediate decision so that students would not be deprived of the newspaper altogether.

In sum, we cannot reject as unreasonable Principal Reynolds' conclusion that neither the pregnancy article nor the divorce article was suitable for publication in Spectrum. Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community" that includes adolescent subjects and readers. Finally, we conclude that the principal's decision to delete two pages of Spectrum, rather than to delete only the offending articles or to require that they be modified, was reasonable under the circumstances as he understood them. Accordingly, no violation of First Amendment rights occurred.

The judgment of the Court of Appeals for the Eighth Circuit is therefore

Reversed.

"STAY-PUT" REQUIREMENT FORBIDS SCHOOL OFFICIALS FROM UNILATERALLY EXCLUDING A HANDICAPPED STUDENT FROM A CLASSROOM FOR DANGEROUS CONDUCT GROWING OUT OF A DISABILITY DURING REQUIRED REVIEW PROCEEDINGS WHEN NORMAL PROCEDURES FOR DEALING WITH DANGEROUS STUDENTS CAN BE UTILIZED.

Honig v. Doe
108 SCt 592 (1088)

Supreme Court of the United States

JUSTICE BRENNAN delivered the opinion of the Court. As a condition of federal financial assistance, the Education of the Handicapped Act requires States to ensure a "free appropriate public education" for all disabled children within their jurisdictions. In aid of this goal, the Act establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree. Among these safeguards is the so-called "stay-put" provision, which directs that a disabled child "shall remain in [his or her] current educational placement" pending completion of any review proceedings, unless the parents and state or local education agencies otherwise agree....Today we must decide whether, in the face of this statutory proscription, state or local school authorities may nevertheless unilaterally exclude disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities.....

The present dispute grows out of the efforts of certain officials of the San Francisco Unified School District (SFUSD) to expel two emotionally disturbed children from school indefinitely for violent and disruptive conduct related to their disabilities. In November 1980, respondent John Doe assaulted another student at the Louise Lombard School, a developmental center for disabled children. Doe's April 1980 IEP identified him as a socially and physically awkward 17 year old who experienced considerable difficulty controlling his impulses and anger. Among the goals set out in his IEP was "[i]mprovement in [his] ability to relate to [his] peers [and to] cope with frustrating situations without resorting to aggressive acts." Frustrating situations, however, were an unfortunately prominent feature of Doe's school career: physical abnormalities, speech difficulties, and poor grooming habits had made him the target of teasing and ridicule as early as the first grade; his 1980 IEP reflected his continuing difficulties with peers, noting that his social skills had deteriorated and that he could tolerate only minor frustration before exploding.

On November 6, 1980, Doe responded to the taunts of a fellow student in precisely the explosive manner anticipated by his IEP: he choked the student with sufficient force to leave abrasions on the child's neck, and kicked out a school window while being escorted to the principal's office afterwards. Doe admitted his misconduct and the school subsequently suspended him for five days. Thereafter, his principal referred the matter to the SFUSD Student Placement Committee (SPC or Committee) with the recommendation that Doe be expelled....

After unsuccessfully protesting these actions by letter, Doe brought this suit against a host of local school officials and the state superintendent of public education. Alleging that the suspension and proposed expulsion violated the EHA, he sought a temporary restraining order cancelling the SPC hearing and requiring school officials to convene an IEP meeting. The District Judge granted the requested injunctive relief and further ordered defendants to provide home tutoring for Doe on an interim basis; shortly thereafter, she issued a preliminary injunction directing defendants to return Doe to his then current educational placement at Louise Lombard School pending completion of the IEP review process. Doe re-entered school on December 15, 5 1\2 weeks, and 24 school days, after his initial suspension.

Respondent Jack Smith was identified as an emotionally disturbed child by the time he entered the second grade in 1976. School records prepared that year indicated that he was unable "to control verbal and physical outburst[s]" and exhibited a "[s]evere disturbance in relationships with peers and adults." Further evaluations subsequently revealed that he had been physically and emotionally abused as an infant and young child and that, despite above average intelligence, he experienced academic and social difficulties as a result of extreme hyperactivity and low self-esteem. Of particular concern was Smith' propensity for verbal hostility; one evaluator noted that the child reacted to stress by "attempt[ing] to cover his feelings of low self worth through aggressive behavior[,]...
primarily verbal provocations."

Based on these evaluations, SFUSD placed Smith in a learning center for emotionally disturbed children....

At the beginning of the next school year, Smith was assigned to a full-day program; almost immediately thereafter he began misbehaving. School officials met twice with his grandparents in October 1980 to discuss returning him to a half-day program; although the grandparents agreed to the reduction, they apparently were never apprised of their right to challenge the decision through EHA procedures. The school officials also warned them that if the child continued his disruptive behavior--which included stealing, extorting money from fellow students, and making sexual comments to female classmates--they would seek to expel him. On November 14, they made good on this threat, suspending Smith for five days after he made further lewd comments. His principal referred the matter to the SPC, which recommended exclusion from SFUSD....

After learning of Doe's action, Smith sought and obtained leave to intervene in the suit. The District Court subsequently entered summary judgment in favor of respondents on their EHA claims and issued a permanent injunction. In a series of decisions, the District Judge found that the proposed expulsions and indefinite suspensions of respondents for conduct attributable to their disabilities deprived them of their congressionally mandated right to a free appropriate public education, as well as their right to have that education provided in accordance with the procedures set out in the EHA. The District Judge therefore permanently enjoined the school district from taking any disciplinary action other than a two- or five-day suspension against any disabled child for disability-related misconduct, or from effecting any other change in the educational placement of any such child without parental consent pending completion of any EHA proceedings. In addition, the judge barred the State from authorizing unilateral placement changes and directed it to establish an EHA compliance-monitoring system or, alternatively to enact guidelines governing local school responses to disability-related misconduct. Finally, the judge ordered the State of provide services directly to disabled children when, in any individual case, the State determined that the local educational agency was unable or unwilling to do so.

On appeal, the Court of Appeals for the Ninth Circuit affirmed the orders with slight modification....Agreeing with the District Court that an indefinite suspension in aid of expulsion constitutes a prohibited "change in placement,...the Court of Appeals held that the stay-put provision admitted of no "dangerousness" exception and that the statute therefore rendered invalid those provisions of the California Education Code permitting the indefinite suspension or expulsion of disabled children for misconduct arising out of their disabilities. The court concluded, however, that fixed suspensions of up to 30 school days did not fall within the reach of section 1415(e)(3), and therefore upheld recent amendments to the state education code authorizing such suspensions. Lastly, the court affirmed that portion of the injunction requiring the State to provide services directly to a disabled child when the local educational agency fails to do so.

Petitioner Bill Honig, California Superintendent of Public Instruction, sought review in this Court, claiming that the Court of Appeals' construction of the stay-put provision conflicted with that of several other courts of appeals which had recognized a dangerousness exception,...and that the direct services ruling placed an intolerable burden on the State. We granted certiorari to resolve these questions,...and now affirm....

The language of section 1415(e)(3) is unequivocal. It states plainly that during the pendency of any proceedings initiated under the Act, unless the state or local educational agency and the parents or guardian of a disabled child otherwise agree, "the child shall remain in the then current educational placement."...Faced with this clear directive, petitioner asks us to read a "dangerousness" exception into the stay-put provision on the basis of either of two essentially inconsistent assumptions: first, that Congress thought the residual authority of school officials to exclude dangerous students from the classroom too obvious for comment; or second, that Congress inadvertently failed to provide such authority and this Court must therefore remedy the oversight. Because we cannot accept either premise, we decline petitioner's invitation to re-write the statute.

Petitioner's arguments proceed, he suggests, from a simple, common-sense proposition: Congress could not have intended the stay-put provision to be read literally, for such a construction leads to the clearly unintended, and untenable, result that school districts must return violent or dangerous students to school while the often lengthy EHA proceedings run their course. We think it clear, however, that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last response, the courts.

As noted above, Congress passed the EHA after finding that school systems across the country had excluded one out of every eight disabled children from classes....

Congress attacked such exclusionary practices in a variety of ways. It required participating States to education all disabled children, regardless of the severity of their disabilities...and included within the definition of "handicapped" those children with serious emotional disturbances. ...It further provided for meaningful parental participation in all aspects of a child's educational placement, and barred schools, through the stay-put provision, from changing that placement over the parent's objection until all review proceedings were completed. Recognizing that those proceedings might prove long and tedious, the Act's drafters did not intend...to operate inflexibly...and they therefore allowed for interim placements where parents and school officials are able to agree on one. Conspicuously absent from section 1415(e)(3), however, is any emergency exception for dangerous student. This absence is all the more telling in light of the injunctive decree issued in PARC, which permitted school officials unilaterally to remove students in "'extraordinary circumstances.'"...Given the lack of any similar exception in Mills, and the close attention Congress devoted to these "landmark" decisions,...we can only conclude that the omission was intentional; we are therefore not at liberty to engraft onto the statute an exception Congress chose not to create.

Our conclusion that section 1415(e)(3) means what is says does not leave educators hamstrung. The Department of Education has observed that "[w]hile the [child's] placement may not be changed [during any complain proceeding], this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others."...Such procedures may include the use of study carrels, timeout, detention, or the restriction of privileges. More drastically, where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 school days. This authority, which respondent in no way disputes, not only ensures that school administrators can protect the safety of others by promptly removing the most dangerous of students, it also provides a "cooling down" period during which officials can initiate IEP review and seek to persuade the child's parents to agree to an interim placement. And in those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts under section 1415(e)(2), which empowers courts to grant any appropriate relief....As the EHA's legislative history makes clear, one of the evils Congress sought to remedy was the unilateral exclusion of disabled children by school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings."...The stay-put provision in no way purports to limit or pre-empt the authority conferred on courts,...indeed, it says nothing whatever about judicial power.

In short, then, we believe that school officials are entitled to seek injunctive relief...in appropriate cases. In any such action...[the law] creates a presumption in favor of the child's current educational placement which school officials can overcome only by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others. In the present case, we are satisfied that the District Court, in enjoining the state and local defendants from indefinitely suspending respondent or otherwise unilaterally altering his then current placement properly balanced respondent's interest in receiving a free appropriate public education in accordance with the procedures and requirements of the EHA against the interests of the state and local school officials in maintaining a safe learning environment for all their students.

We believe the court below properly construed and applied section 1415(e)(3), except insofar as the Court of Appeals held that a suspension in excess of 10 school days does not constitute a "change of placement." We therefore affirm the Court of Appeals' judgment....

Affirmed.

A STATE'S OPEN RECORDS LAW MAY MAKE A TEACHER'S PERSONNEL FILE SUBJECT TO A CITIZEN'S INSPECTION.

Hovet v. Hebron Public School District
419 NW 2d 189 (1988)

Supreme Court of North Dakota

VANDE WALLE, Justice. Meredith Hovet appealed from a judgment of dismissal declaring his personnel file to be a public record open for inspection by the public under the provisions of Sections 44-04-18 and 15-29-10, N.D.C.C., and Article XI, Section 6, of the North Dakota Constitution....

Hovet was employed by the Hebron Public School District...as a teacher of business education and physical education during the 1986-1987 school year and had been so employed for the previous three school years. During the course of this employment a personnel file was maintained by the School District.

By a letter dated May 21, 1987, Madonna Tibor requested that the School District allow her to review Hovet's personnel file. Subsequently the superintendent for the School District agreed to provide a review of Hovet's personnel file on June 2, 1987.

Hovet then filed a complaint seeking a permanent injunction enjoining the School District from allowing the review of his personnal file by anyone other than a legal representative of the School District. At this time Hovet also sought a temporary restraining order prohibiting the review. A hearing was held and a temporary restraining order was granted....

Hovet and the School District each argued that the personnel file was confidential. Tibor argued that the personnel file was a public record open to inspection. Thereafter the trial court determined that Hovet's personnel file was a public record open for inspection under Section 44-04-18 and 15-29-10, N.D.C.C., and Article XI, Section 6, of the North Dakota Constitution. The trial court issued a judgment of dismissal. It is from the judgment that Hovet appealed. We note that the School District has aligned itself with Hovet and against Tibor on appeal.

Hovet and the School District concede that the personnel file is a government record, and argue that it is a record not open to public inspection because certain statutes protect a teacher's personnel file from inspection under the open-records law. The concession that the personnel file is a government record is based upon this court's decision....

Open governmental records in North Dakota are required by our

Constitution and our statutes. Article XI, Section 6, of the North Dakota Constitution provides:

> Unless otherwise provided by law, all records of public or governmental bodies, boards, bureaus, commissions, or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.

Section 44-04-18, N.D.C.C., tracks and implements Article XI, Section 6. It provides:

> 1. Except as otherwise specifically provided by law, all records of public or governmental bodies, boards, bureau, commissions or agencies of the state or any political subdivision of the state, or organizations or agencies supported in whole or in part by public funds, or expending public funds, shall be public records, open and accessible for inspection during reasonable office hours.
>
> 2. Violations of this section shall be punishable as an infraction.

The first argument of Hovet and the School District is that Section 15-47-38, N.D.C.C., provides an implied exception to the open-records law. Section 15-47-38 specifies the procedures to be utilized when a school board discharges a teacher or decides to not renew a teacher's contract. Among these procedures are the following: For a nonrenewal decision the reasons for nonrenewal must be drawn from specific and documented findings arising from formal reviews conducted by the board with respect to the teacher's overall performance; that such proceedings must be held in an executive session unless both parties agree to open them to the public; that no action for libel or slander shall lie for statements expressed orally or in writing at the executive sessions. Hovet and the School District argue that these procedures are designed to facilitate openness in the proceedings and to protect the teacher's reputation. They reason that opening to the public a teacher's personnel file--which would be reviewed at these proceedings--harms the above-stated goals. Thus, they conclude, an exception for teachers' personnel files from the open-records law must be implied.

This argument, however, ignores the language of the open-records law. Section 44-04-18(1), N.D.C.C., provides that all governmental records are open to the public "Except as otherwise specifically provided by law,...."[Emphasis added.]...Thus, because the open-records law provides that governmental records are to be open to the public "except as otherwise specifically provided by law,: an exception to the open-records law may not be implied. In order that a record may be excepted from the open-records law the Legislature must specifically address the status of that type of record--e.g., statements that a certain type of record is confidential or that it is not open to the public....

Thus, for an exception to the open-records law to exist under our constitutional and statutory provisions, it must be specific, i.e., the Legislature must directly address the status of the record in question, for a specific exception, by the plain terms of those provisions, may not be implied. Therefore, the contention that an exception to the open-records law for teacher personnel files should be implied from Section 15-47-38, N.D.C.C., must fail.

Hovet next alleges that he has a right to privacy guaranteed to him by the United States Constitution and the North Dakota Constitution, which will be violated if the public is allowed to inspect his personnel file. Teachers, like students, do not "shed their constitutional right...at the schoolhouse gate." Tinker v. Des Moines Community School Dist.,...But we rejected the claim that a governmental employee's personnel file is protected by a constitutional right to privacy in City of Grand Forks v. Grand Forks Herald....Our position has not changed.

In Grand Forks Herald we decided that personnel records are not protected by the right to privacy arising under the Federal Constitution because personnel records do not concern a subject to which the Federal right to privacy has been recognized as applying. As we noted, the Federal right to privacy is limited to "cases involving governmental intrusions into matters relating to marriage, procreation, contraception, family relationships, child rearing, and education."...

In Grand Forks Herald we also refused to find that a governmental employee's personnel record was protected by a right to privacy arising from the North Dakota Constitution. We noted that there is no explicit right to privacy under our Constitution, and we declined to consider whether such a right to privacy could be inferred under our Constitution. Even if a right to privacy existed under our Constitution, there would be no right of privacy "in a personnel record of a person employed by a public agency...." A teacher's personnel file has not been shown to be different from the personnel files of other governmental employees. Therefore, we reject Hovet's argument....

Hovet...contends that school students have a right to privacy which will be violated if a teacher's personnel file is open to public inspection. In making this argument Hovet notes that names of students may be placed in a teacher's personnel file in notations concerning the teacher.

Considering what we stated in the previous section about the right to privacy under the Federal and State Constitutions, we decline to consider this issue. Even if a student had a privacy interest in this case, to consider this issue would violate the general rule that "A litigant may assert only his own constitutional rights, unless he can present 'weighty countervailing policies.'"...Hovet has not raised sufficiently "weighty countervailing policies" for us to depart from the general rule.

We recognize that Hovet and the School District have raised some strong public-policy arguments for the exception of teacher personnel records from the open-records law. However, as the trial court noted, "such policy considerations are for the legislature and the courts must apply the law as it exists."...

The judgment is affirmed.

THE REASONABLE SUSPICION STANDARD APPLIES IN THE LAWFUL SEARCH OF A STUDENT'S PURSE.

In Interest of Doe
887 P2d 645 (1994)

Supreme Court of Hawai'i

MOON, Chief Justice....

We explicitly adopt the standards set out in the United States Supreme Court's decision in New Jersey v. T.L.O.... and hold that: (1) children in school have legitimate expectations of privacy that are protected by...the fourth amendment to the United States Constitution; (2) public school officials act as representatives of government and, consequently, must comply with ...the fourth amendment to the United States Constitution; (3) because the warrant requirement is particularly unsuited to the school environment, in that requiring a teacher to obtain a warrant before searching a child suspected of an infraction of the school rules or of the criminal law would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools, public school officials do not need search warrants or probable cause to search or seize evidence from students under their authority; (4) searches or seizures in the school context must be reasonable under all the circumstances and must be (a) justified at their inception and (b) reasonably related in scope to the circumstances which justified the interference in the first place.

Because it was reasonable for the principal in this case to suspect that Minor had violated the law and that the incriminating evidence would be found in Minor's purse, we conclude that the search was lawfully conducted; accordingly, we affirm....

As Justice Powell has noted, "[t]he primary duty of school officials and teachers...is the education and training of young people," T.L.O.,...and that a "[s]tate has a compelling interest in assuring that the schools meet this responsibility. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students."...We further recognize, as also noted by the T.L.O. court, that disorder in schools has become unsettling; "drug use and violent crime in schools have become major social problems."...Schools in Hawai'i have not been immune from these social problems which are responsible for a school environment in which students and school personnel alike are in fear for their safety. To say that such an environment is not conducive to learning would be a gross understatement.... [T]he Court concluded that "the legality of a search of a student should depend simply on the reasonableness, under all circumstances, of the search....This reduced level of suspicion, commonly referred to as the "reasonable suspicion" test...is two prong:

> [F]irst, one must consider whether the...action was justified at its inception,...second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place[.] Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction....

...Drug use and violent crime are socially detrimental forms of behavior in general, but in light of the schools' legitimate need to maintain order in an environment where our youth may learn, their repugnance is exacerbated. We therefore explicitly adopt the T.L.O. standard....

Turning to the facts at bar, because the principal was not obligated to first obtain a warrant to search minor's purse, the first and foremost query is whether there were reasonable grounds for suspecting that the search of Minor's purse would turn up evidence of marijuana use; stated differently, the query is whether the search was "justified at its inception." The following evidence is significant: (1) Minor was discovered during school hours in the "Tunnel," an area in which students congregate to smoke cigarettes and marijuana; (2) the reputation of the "Tunnel" was common knowledge within the school community; (3) the school officials detected the odor of burning marijuana emanating from the "Tunnel" grate; (4) the school officials found no one else in the "Tunnel" except for the four students; and (5) Minor and another student were carrying purses, a likely storage place for marijuana. In view of such evidence, it is apparent that the principal had reasonable ground to suspect that Minor may be concealing marijuana in her purse....Considering the information available to the principal just prior to the search, his suspicion that Minor may have been carrying marijuana in her purse was reasonable because it was supported by sufficient factual probability. Hence, the search was "justified at its inception."

The second prong of the "reasonable suspicion" test requires that we determine whether the search was "reasonably related in scope to the circumstances which justified the interference in the first place." T.L.O....Based upon the suspicion that the students had been smoking marijuana, the principal asked Minor and the other student to empty their pockets and purses. Teenage girls often carry personal belongings in their pockets or purse, and it is the most probable place for concealing a plastic bag of marijuana and related paraphernalia. There, the search of the purse was reasonably related to the objective, which was to find evidence of marijuana use....

We therefore join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of school children with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause....

Because a search of student's wallet, purse, or other bag carried on his or her person, is "undoubtedly a severe violation of subjective expectations of privacy," *T.L.O.*...we conclude that "individualized suspicion" is a necessary element in determining reasonableness where, in this case, the principal emptied the contents of Minor's purse.

Here, the odor of burning marijuana emanated from a confined area frequented by individuals who smoked marijuana. School officials did not observe any one else in the area except for Minor and three other students. Their suspicion could be reasonably narrowed to the four students found in the "tunnel" and further narrowed to the Minor because she was one of two students carrying a purse. Thus, we conclude that the individualized suspicion element of the reasonableness standard was met, and the search was lawfully conducted.

Based upon the foregoing discussion, we affirm.

WHEN A SCHOOL, HAVING NO INDIVIDUALIZED SUSPICION OF A STUDENT, USES METAL DETECTORS TO SEARCH A STUDENT FOR WEAPONS UPON ENTERING A HIGH SCHOOL, THE STUDENT'S FOURTH AMENDMENT RIGHTS AGAINST UNREASONABLE SEARCH AND SEIZURE ARE NOT VIOLATED.

In Interest of F. B.
658 A 2d 1378 (1995)

Superior Court of Pennsylvania

JOHNSON, Judge:

In this appeal, we are asked to determine whether the search of a student by school officials as part of a school-wide search of students for weapons was reasonable under the circumstances where the officials had no individualized suspicion that the student was armed. Finding that no individualized suspicion was required under the circumstances, we conclude that the search was reasonable....

Students at University High School in the City of Philadelphia are prohibited from bringing weapons or drugs onto school property. If students are found in possession of these items, they are arrested. Letters are sent home throughout the year informing parents and students of this policy.

To enforce this policy, the Philadelphia school district employs police officers to conduct in-house metal-detector scans and bag searches of the students at University High School. signs are posted on the front door and throughout the school notifying the students of these searches. Upon entering the building, the students are led into the gymnasium where they form lines and, one by one, step up a table. Once at the table, each student empties his pockets and surrenders his jacket and any bags he may be carrying. While an officer searches the student's belongings, the student is told to step to the end of the table where he is scanned by a metal detector. If no drugs or weapons are found, the student is permitted to retrieve his belongings. Every student is searched in this manner until the gymnasium becomes too crowded, at which time school administrators randomly select students to be searched.

The trial court found that when the juvenile, a University High School student, stepped up to the table and emptied his pockets, he discarded a Swiss-type folding knife....The juvenile then was escorted to a holding room where he was placed under arrest for possessing a weapon on school property.

The juvenile filed a suppression motion seeking to suppress the evidence seized. The trial court denied the juvenile's motion and adjudicated him delinquent. The juvenile had been placed on probation after prior adjudications of delinquency. Thus, the court ordered that the juvenile remain on probation. This appeal followed.

On appeal, the juvenile contends that the trial court erred in denying his suppression motion because the police searched him without reasonable suspicion or probable cause to believe that he had violated any school regulation. Thus, he argues that the search violated his rights against unreasonable searches and seizures under both the United States and Pennsylvania Constitutions....

The United States Supreme Court in New Jersey v. T.L.O....held that the Fourth Amendment's prohibition of unreasonable searches and seizures applies to searches conducted by public school officials. The Supreme Court then assessed the standards which should govern such searches and determined that a balance must be struck between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place....The Court concluded that the accommodation of these competing interests "does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."...

The Supreme Court established a two-part test to assess the reasonableness of any school search. First, it must be determined whether the action was justified at its inception....Second, it must be determined whether the search, as conducted, was reasonably related in scope to the circumstances that justified the interference in the first place....

The juvenile contends that the search was unreasonable in light of the T.L.O. factors. Specifically, he argues that the search was not justified at its inception because there were no reasonable grounds to believe that he was carrying contraband. The juvenile asserts that the T.L.O. requirements cannot be evaded merely by searching the entire student population. Rather, he maintains that "individualized suspicion" must be required when school authorities subject students to such highly intrusive searches. Whether school officials need individualized suspicion to search students is an issue of first impression in this Commonwealth.

The T.L.O. Court determined that, ordinarily, a student search is justified at its inception where "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." T.L.O....However, the Supreme Court in T.L.O. did not decide whether individualized suspicion is an essential element of the reasonableness standard that it adopted for searches by school authorities....In fact, the Supreme Court pointed out that it previously had concluded that the Fourth Amendment imposes no irreducible requirement of individualized suspicion....In addition the Court noted that exceptions to the requirement of individualized suspicion are appropriate

> where the privacy interest implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"...

For example, the United States Supreme Court, as well as courts across the country, have permitted administrative searches where law enforcement authorities have no individual suspicion when the searches are conducted as part of a general regulatory scheme to ensure the public safety, rather than as part of a criminal investigation to secure evidence of crime....Such searches are reasonable when the intrusion involved in the search is no greater than necessary to satisfy the governmental interest justifying the search, i.e., courts balance the degree of intrusion against the need for the search. Thus, courts, have approved airport searches,...Courthouse security measures,...license and registration vehicle stops,...and border-patrol checkpoints....

Nevertheless, the juvenile alleges that the search in the present case does not fall within the exceptions set forth in T.L.O. First, the juvenile claims that the privacy interest is not minimal because this was a search of his person. However, we must balance the school's compelling interest in promoting an environment which is safe and conducive to learning against the school-child's privacy interest. As a New York court recognized, "[i]f schools cannot operate in a violence-free atmosphere, then education will suffer, a result which ultimately threatens the well-being of everyone."...We find that the school's interest in ensuring security for its students far outweighs the juvenile's privacy interests. In addition, the trial court found, and we agree, that, in light of the school's efforts to make students and parents aware of their search policy, "the [juvenile]'s expectation of privacy was greatly reduced by the notice he received prior to the search."...Therefore, under these circumstances, we believe that the juvenile's privacy interest is minimal.

Next, the Juvenile asserts that there were no safeguards assuring that his expectation of privacy was not subjected to the discretion of the official in the field. See T.L.O., supra. Namely, he charges that there were no written guidelines governing the search. Although we believe written guidelines would be prudent, we find that there were "other safeguards" present in this case....Specifically, the officers who conducted the student searches followed a uniform procedure as they searched each student, i.e., after each student's personal belongings were searched, the student was scanned by a metal detector. This uniformity served to safeguard the students from the discretion of those conducting the search.

Nevertheless, the juvenile suggests that school administrators had complete discretion to choose which students to search randomly after the gymnasium became crowded. However, we need not determine whether the random selection process subjected students to the discretion of school administrators because the juvenile does not allege that he was among those randomly chosen. Thus, this question is not properly before our Court, and we will not consider it. Because the juvenile's privacy interest was minimal and his expectation of privacy was not subject to the discretion of the official in the field, no individualized suspicion was required to search the juvenile. See T.L.O. supra.

Here, the trial court applied the reasonableness factors set forth in T.L.O. and found that the search was justified at its inception because of the high rate of violence in the Philadelphia public schools. Further, the court found that it was reasonable to search all students prior to entering the school because there is no way to know which students are carrying weapons. There, the trial court concluded, and we agree, that the search of the juvenile satisfied the T.L.O. test for reasonableness.

Insofar as school authorities in the present case were also searching for drugs, we do not determine whether the need to promote safety in the school also served to justify this aspect of the search. That question is not properly before us because only a weapon was discovered in the juvenile's possession..

Accordingly, having determined that no individualized suspicion was required in this case, we conclude that this search did not violate the juvenile's Fourth Amendment right because it satisfied the T.L.O. test for reasonableness....

Based upon the foregoing, we conclude that the trial court properly denied the juvenile's suppression motion and, accordingly, affirm the order which directed that the juvenile remain on probation after he was adjudicated delinquent.

Order affirmed.

A TRANSFER PLAN FOR TEACHERS MAY BE BASED ON RACE TO ACHIEVE AN INTEGRATED FACULTY.

Jacobson v. Cincinnati Board of Education
961 F 2d 100 (1992)

United States Court of Appeals, Sixth Circuit

ALAN E. NORRIS, CIRCUIT JUDGE. Eight Cincinnati public school teachers and the Cincinnati Federation of Teachers ("CFT"), the union that represents them, brought suit in the district court challenging the teacher transfer policy adopted by the Cincinnati Board of Education ("Board") to ensure that the faculty of its schools reflects system-wide racial balance.

This dispute has its genesis in the 1970s, when concerted efforts to eradicate indicia of racial segregation within the Cincinnati public school system began. On January 14, 1974, the Board adopted a policy designed to ensure that the teaching staff of a given school approximated the racial balance of the teaching staff of the system as a whole. Shortly thereafter, the Board issued a statement indicating how this general policy would be implemented. Among other things, the statement provided that the percentage of black teachers in any school should not be five percent greater or less than the percentage of black teachers throughout the system. In order to implement this racial balance, the policy restricts the ability of some teachers to voluntarily transfer to other school buildings, and requires the reassignment of others. It is this portion of the policy which plaintiffs challenge.

In the same year that these efforts to balance the racial composition of the faculty were initiated, a group of school children and their parents filed a lawsuit against the Board, contending that the school system was unlawfully segregated. That suit was ultimately settled by the parties, and the district court adopted the settlement agreement as a consent decree....The CFT actively participated in...[the settlement agreement] and did not object to the maintenance of the staff racial balance policy. The position of the CFT is reflected in the CBA negotiated with the Board Section 250, paragraph 1, of the CBA contained the following provision regarding teacher transfers: "Teacher requests for transfer will be honored if positions are available and the teacher is qualified for a particular vacancy, provided that the transfer is consistent with the racial balance of the staff."

We begin by noting that school authorities have broad discretion to implement educational policy. Swann v. Charlotte-Mechlenburg Bd. of Educ. This authority includes the power to prescribe a ratio of white to minority students that reflects the composition of the overall school district, particularly when such a policy is implemented in order to prepare students for life in a pluralistic society. And we believe that this discretionary authority includes the power to assign faculty to achieve a racial ratio reflecting the racial composition of the system's teachers. The Supreme Court has recognized that the attainment of an integrated teaching staff is a legitimate concern in achieving a school system free of racial discrimination....

Here, the district court found that the policy adopted by the Board is race conscious in the sense that it allows the Board to determine the schools at which a teacher may teach solely on the basis of his or her race. However, the court went on to find that the policy is "specific race neutral in that there is no disparate impact as to race in its application. It is applied equally to both black and white teachers. In some instances, it will benefit or harm white teachers; in others, it will benefit or harm black teachers." We agree with that characterization. We are therefore unable to agree with plaintiffs' contention that the policy established preferences based on race that require us to examine the policy with strict scrutiny to determine whether it conflicts with guarantees afforded them under the Constitution.

Under analogous circumstances, the Court of Appeals for the Third Circuit offered these observations concerning the appropriate level of scrutiny to which such a policy should be subjected:

> No case has suggested that the mere utilization of race as a factor, together with seniority, school need, and subject qualification, is prohibited. Since the classification is not preferential, it might most appropriately be reviewed for its rational relationship to a legitimate government objective, under which standard it would be patently valid. At most, since there is some element of racial classification, albeit not of preference, the appropriate level of scrutiny would be the intermediate level suggested by four members of the Court in Bakke, in which classification was indeed preferential..
>
> The appropriate question under that standard is whether the classification "serve[s] important governmental objectives" and is "substantially related to achievement of those objectives." Kromnick...

In our view, this intermediate level of scrutiny is the proper one, since the Cincinnati teacher transfer policy, like the policy challenged in Kromnick, does not prefer one race over another. Accordingly, we must determine whether the policy is substantially related to an important governmental objective. We believe the policy at issue meets that test. It was implemented to achieve a racially integrated faculty throughout the Cincinnati public school system. Not only is this a legitimate objective, it has been endorsed in the past by the CFT. In fact, section 250 of the CBA, which appellants mistakenly contend has been violated by the Board, expressly allows for the accommodation of such a transfer policy.

We therefore hold that plaintiffs have failed to demonstrate how their interest in selecting the schools to which they are assigned outweighs the Board's interest in fostering an integrated, pluralistic school system.

The judgment of the district court is affirmed.

SCHOOL STRIKE MAY CREATE A DANGER TO HEALTH, SAFETY, OR WELFARE OF THE PUBLIC.

Jersey Shore Area School District v.
Jersey Shore Education Association
548 A 2d 1202 (1988)

Supreme Court of Pennsylvania

STOUT, Justice. This appeal is brought by the members of the Jersey Shore Education Association, which represents the teachers of the Jersey Shore Area School District. In it we are asked to reconcile that provisions of the Public Employees Relations Act (PERA)...which gives teachers the right to strike, with that provision of the Public School Code...which mandates that school districts provide 180 days of pupil instruction. Specifically, PERA provides:

> If a strike by public employees occurs after the collective bargaining processes set forth in...this act have been completely utilized and exhausted, it shall not be prohibited unless or until such a strike creates a clear and present danger or threat to the health, safety or welfare of the public.

...On the other hand, the Public School Code provides: "All public kindergartens, elementary and secondary schools shall be kept open each school year for at least one hundred eighty (180) days of instruction for pupils."...

On September 10, 1984, after only four days of pupil instruction, the teachers struck against appellee, Jersey Shore Area School District. On October 8, 1984, the school district filed for an injunction in the Court of Common Pleas of Lycoming County, in an effort to force the teachers back to work. A hearing was held on October 10, 1984, following which the Chancellor issued an injunction ordering the teachers back to work on October 11. The additional hearing was held on October 23, 1984. The Chancellor refused to lift the injunction. The Association appealed to the Commonwealth Court, which affirmed solely on the basis of the Chancellor's finding that the school district's impending inability to schedule 180 days of instruction presented a clear and present danger to the public because of a threatened loss of state subsidies....While we disagree with the Commonwealth Court that the threatened loss of state subsidies alone would support the issuance of an injunction, we nonetheless affirm on the record as a whole....

At the first hearing the superintendent for the school district testified that he had prepared a revised school calendar.

Allowing for six snow days and two nonmandatory holidays, the superintendent had concluded that October 15, 1984, would be the last date upon which the teachers could return to the classroom while still ensuring an educationally-sound schedule. In addition, the superintendent testified extensively as to the financial impact of the strike. He stated that the school district stood to lose $26,637.00 per day in state subsidies for each day it fell short of 180 days of instruction. At the time of the hearing the superintendent estimated that the strike had cost the school district $65,944.00 in unemployment compensation, additional salaries and other costs incidental to the strike.

With respect to the students, the superintendent stated that the strike placed the seniors at a competitive disadvantage in terms of SAT testing. Seniors also faced deadlines with respect to scholarship applications and were bereft of guidance counseling services. The longer the strike, the more deleterious its effect on the future of the seniors.

With respect to other grades, students would be at a competitive disadvantage in taking state-mandated tests to determine remedial needs. With only four days of instruction, some students could be placed in remedial courses which they would not otherwise have needed. Moreover, in the event the school district could not administer these tests due to the continuation of the strike, it would lose state funding for the remedial courses themselves.

The superintendent stated that interference with a regular pattern of study, as had occurred in this strike, results in a loss of learning capacity, which increases with the length of the interruption. In support of this hypothesis he cited test scores from a previous year showing a drop in student aptitudes following a strike.

Finally, the superintendent expressed his concern that the strike deprived eligible students of a free, hot lunch, possibly the only such meal they receive, while working parents were experiencing difficulties with interim babysitting arrangements.

The school teachers presented the testimony of two experts. The first disputed the superintendent's interpretation of prior test scores insofar as their reflecting a decrease in pupil learning due to the previous strike. This expert opined that it was inappropriate to compare different student groups for such a purpose. The second expert testified that, as of the date of the hearing, the school district would actually have a net savings in salaries and benefits of $24,199.00 over the potentially lost subsidy.

Having heard this evidence, the Chancellor issued the injunction on the basis of his conclusion that all of the evidence had demonstrated the existence of a clear and present danger to the health and welfare of the community.

At the reconsideration hearing, little additional evidence was presented except that two officials of the Department of Education testified as to departmental policy with regard to withholding subsidies and as to their calculations with regard to the last possible date upon which the teachers would have to return to the classroom in order to ensure a 180-day calendar. Following this testimony, the Chancellor refused to lift the injunction....

Since this is an issue of first impression for this Court, we shall begin our legal analysis with a brief review of the decisions of the Commonwealth Court that have addressed it. In Armstrong School District v. Armstrong Education Ass'n,...Commonwealth Court grappled with the definition of "clear and present danger or threat" in analogizing it to First Amendment, free speech and association cases....The Court concluded:

> In this light, the determination of whether or not a strike presents a clear and present danger to the health, safety of welfare of the public must, therefore, require the court to find that the danger or threat is real or actual and that a strong likelihood exists that it will occur. Additionally, it seems to us that the "danger" or "threat" concerned must not be one which is normally incident to a strike by public employees. By enacting [PERA] which authorizes certain inconveniences, for such are inevitable, but it obviously intended to draw the line at those which pose a danger to the public health, safety or welfare.

...In reserving the issuance of an injunction, the Court stated that the disruption of routine administrative procedures and the cancellation of extracurricular activities were inconveniences inherent in a teacher's strike, inconveniences envisioned by the legislature which, if considered a "clear and present danger or threat," would virtually nullify the right to strike....In dicta the Court also stated that if a strike lasted so long as to make the 180-days calendar an impossibility, and the cessation of subsidies a possibility, it properly could be enjoined.

In Philadelphia Fed. of Teachers v. Ross...the Court affirmed the issuance of an injunction where the board presented evidence of sharply increased gang activity that necessitated $133,000.00 per day in increased police protection, endemic student underachievement, possibly loss of state subsidies, and the disqualification of seniors from entering college....

...See also Bethel Park School Dist. v. Bethel Park Fed. of Teachers,...(loss of state subsidies, instructional days, vocational job training, higher education and special education opportunities, counseling, social and health series, extracurricular programs and employees' work and wage opportunities constituted a clear and present danger to the community.)

In Bellefonte Area School Bd. v. The Bellefonte Area Educ. Ass'n...The Court reversed the issuance of an injunction in concluding that the facts did not support a finding of "clear and present danger or threat." Since in that case sufficient make-up days remained to replace the thirteen strike days, therefore, the loss of state subsidies was not imminent. Moreover, the possible loss of participation in an educational quality assessment program was not deemed harmful enough to justify the injunction....

This brief history reflects judicial difficult, and at times divergence, in reconciling the right to strike with the requirement of 180 instructional days. While some cases have looked at a plethora of factors, including the loss of state subsidies, others have looked only at the loss of state subsidies in determining that it per se creates a clear and present danger or threat. We do not believe that the language of PERA necessitates judicial hand-wringing or hair-pulling. We hold that the loss of state educational subsidies for failure of a school district to schedule 180 days of instruction for pupils, alone, does not constitute a "clear and present danger or threat to the health, safety or welfare of the public." In this case the school district demonstrated beyond peradventure the existence of a "clear and present danger or threat to the health, safety or welfare of the public." Without focusing on any one of the myriad economic and other facts upon which the school board relied, without weighing the interests of senior as weightier that those of kindergartners, we conclude that, in conjunction, these factors created a school district which, although perhaps able to "make up" a day or two of instruction, could not "make up" the actual, the impending and the ever-increasing harm which was being wrought upon its students. On this record, the health and welfare of the students, who cannot and must not be treated as a category separate from the public at large, was clearly endangered and threatened.

The order of the Commonwealth Court is affirmed.

THE COMPULSORY ATTENDANCE EXCEPTION GRANTED THE AMISH DOES NOT EXTEND TO A BAPTIST SCHOOL.

Johnson v. Charles City Community Schools Board of Education
386 NW 2d 74 (1985)

Supreme Court of Iowa

Considered en banc.

HARRIS, Justice. Plaintiffs are the pastor and certain members of a fundamentalist Baptist church in Charles City. The controversy arose following their organization of a parochial school. The parents were charged with violating Iowa's compulsory attendance law....The section is quite typical in that it places the sanction for failure to attend on the parent rather than the child. The parents here responded by bringing two separate proceedings. One was a declaratory judgment action which challenged our statutory education requirements, not only the compulsory attendance statute but also certain reporting requirements....The second response was to apply to the state board of public instruction for relief under...the Amish exception....

The district court denied declaratory relief and affirmed on the administrative appeal. We agree with plaintiffs' contention that the religious freedoms guaranteed them under the first amendment entitle them to educate their children at the private religious school they have established. The same guarantees accord them the right to operate the school with minimal necessary supervision by the state....

Both challenges are rooted in the plaintiffs' deeply held religious beliefs. They perceive their school, which they describe as their "week day educational ministry," to be an integral part of the exercise of their religion. It is named Calvary Baptist Christian Academy.

When it was set up in the fall of 1980 the school was not incorporated separately from the church. The curriculum chosen, the Accelerated Christian Education Program, has not as yet been challenged as inadequate by any state authorities. At the bottom of this litigation is the fact that plaintiffs are unwilling to submit to any state inquiry on the matter. In their view, the educational content and process of their school, because it is central to their religion, is not properly subject to state oversight....

According to the trial court's findings, beginning in the 19th century, there has been growing concern among Christian "fundamentalist" churches with what they consider to be the calamitous threat of secular humanism. The trial court pointed out in its findings:...

> Iowa law does not require that all children attend public schools, reflecting a long tradition of friendly coexistence between private and public schools....This accommodation, dating from the first years of our statehood, was reached at least three quarters of a century before the United States Supreme Court ruled that a state cannot compel all students to be educated in public schools. Pierce v. Society of Sisters,....

The Pierce opinion, however, carefully and expressly excluded from its sweep any limitation or curtailment of

> the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare....

That power thus acknowledged in the states to provide out of social necessity for minimum educational standards has enjoyed continuing endorsement in later opinions....("There is no doubt as to the power of the State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education") Lemon v. Kurtzman....("[S]tate requirements under school-attendance laws are examples of necessary and permissible contact" between government and religious organizations, illustrating the impossibility of "total separation of [church and state] in an absolute sense."); Sherbert v. Verner...(free exercise of religion may be subordinate to overriding, compelling state interest in regulation of proper subject)....

While the state authority to intrude into private religious schools is, as we shall point out, confined to a necessary minimum, a clear authority, even a duty, does exist.

The foregoing authorities also make it clear that first amendment considerations limit the extent to which a state can intrude in the educational affairs of a private religious school. Under Pierce, parents are free, notwithstanding compulsory education statutes, to provide for a private education in a religious forum of their own choosing. This fundamental right would be hollow to the point of nonexistence if the state were to so closely superintend the school as to compromise its religious independence....

In their appellate brief and upon oral submission of their appeal the plaintiffs, as mentioned, suggest that their position of absolute and total rejection of any public regulation can and should be accommodated by Iowa's educational scheme. Yet they concede the general right of the public to demand education for all its children. Plaintiffs suggest that the public could satisfy its rightful role while at the same time protecting plaintiffs' first amendment rights by merely testing the children.

We reject the suggestion because it does not do enough for the children. To merely test the children as we shall explain in a later division, does not satisfy the state's rightful role. Whatever limitations are imposed on the state's general right and duty to see to the education of its youth, the right extends beyond occasional testing. It plainly extends to such matters as basic parameters for curriculum and teacher qualifications....

A principal difficulty in plaintiffs' assertion is that anyone can make it, not only high-minded and sincere people, but also a host of others whose children's educations also are at stake.

The state has a clear right to set minimum educational standards for all its children and a corresponding responsibility to see to it that those standards are honored. When such standards are set in place, compliance with them falls within the ambit of the fundamental contract between the citizen and society. It need scarcely be said that each of us, in order to enjoy membership in an organized social order, is pledged to adhere to a number of minimum norms. Of these, one of the most central is society's duty to educate its children.

The nature and extend of education remain largely a matter of personal choice. But there are basic minimums and, this being true, it is up to the people as a whole to set them. One way they have done this is to enact compulsory education statutes. A citizen must submit to them, persuade society to change them, or join a society without them....

It is enough here to reject the challenge plaintiffs do raise. We reject it because the state can reasonably regulate the basic educational requirements of all children within its borders. The state can inquire into private educational institutions in order to see this is done....

It remains for us to consider plaintiffs' appeal from the district court decision on judicial review....

This was the proceeding in which plaintiffs sought a determination that their school should escape state control under section 299.24, the Amish exception.

This provision was noted in Wisconsin v. Yoder....as Iowa's resolution of the conflict between compulsory education and the uniquely isolated Amish culture in our midst. Under section 299.24 certain religious societies can apply to the state superintendent for an exemption for the compulsory attendance laws. Upon being satisfied the requirement of the statute are met, the superintendent, subject to the approval of the state board of public instruction, may, but is not required to, grant the exemption....

The board of education denied the application in the belief there was no essential conflict between plaintiffs' legitimate educational goals and those specified in section 257.25. Section 257.25 specifies in considerable detail the educational standards for public schools in Iowa. The district court held there was nothing unreasonable, arbitrary, or capricious in the denial. It also held the denial did not render section 299.24 unconstitutional as applied to the plaintiffs.

Plaintiffs' administrative appeal challenges both of these determinations. Plaintiffs contend they fall within the ambit of the statute's language and hence qualify for the exemption. They also contend it is unconstitutional to deny them the exemption. Our scope of review differs for the two contentions....

In view of the historical background for section 299.24 (the plaintiffs themselves call it the "Amish exception") we do not think the legislature intended the exemption to be available to any and all church groups who seek to provide for a religiously oriented education. If this had been the legislative goal a much broader statute would have been required....plainly, all parochial schools in the state are not intended for the exemption. The statute calls, not for a religious evaluation by the superintendent, but for an analysis of the educational goals of the group applying for exemptions and a comparison of those goals with those set up for public school children. Because of the conviction that religion is the basis for education, held by these plaintiffs and by all who support parochial education, the superintendent faces a mixed and somewhat complex question....

Plaintiffs offered no evidence that any principle or tenet of their church is in conflict with teaching the subjects listed in the statute. Rather, they insisted only that their church be able to teach those subjects in its own way with books and teachers of its own exclusive choice. Nothing in section 257.25, as interpreted and applied here, would deny them that opportunity. Thus the state board cannot be said to have acted unreasonably, arbitrarily or capriciously in rejecting their exemption request....

We conclude, giving due and required deference to the administrative findings of the superintendent, that the plaintiffs have not established any substantial dissimilarity between their education goals and those specified for public schools, certainly none which sets them apart from all the many other parochial schools in the state....

We next consider the first of two constitutional facets of plaintiffs' challenge to the administrative denial of their application for an Amish exemption. They first argue it was a violation of their first amendment right to deny them the exemption.

Section 299.24 was our legislature's response to precisely the same concerns later involved in Wisconsin v. Yoder. The statute, its subject, purpose, meaning, and application are fully explained in the Yoder opinion.

The United States Supreme Court employed a balancing test to weight the acknowledged and valid public interest in imposing reasonable regulations and minimum education standards against the fundamental right of the Amish to direct the religious upbringing of their children. A number of factors were considered in the weighing:

1. The sincerity of their commitment to a long established religion;
2. An intricate and crucial interrelationship between those beliefs and their mode of life;
3. The vital role their beliefs and life mode play in the survival of Amish culture;
4. The hazards of enforcing compulsory education laws against them; and
5. The adequacy, in terms of their peculiar needs, of the informal vocational education provided to their youth past the eighth grade.

The court found that the state failed to show how, on balance, its legitimate interest in assuring educated and self-reliant citizens justified a requirement that Amish children attend school for two additional years (past eighth grade) in contravention of their religious beliefs. The state moreover failed to prove that exempting the Amish from two additional years of education would seriously curtail the efficient operation of their school laws.

When the same factors are placed in balance on this record the opposite conclusion asserts itself. Sincerity of belief is the only factor wholly common to both the Amish and these plaintiffs....

Whatever they may feel about their children's religious needs, the plaintiffs have not established that their children's education needs are significantly different from those of other children. The superintendent's determination not to grant plaintiffs an Amish exception did not infringe upon their religious rights under the first amendment.

Plaintiffs also ground their appeal from the decision on judicial review upon an equal protection claim....

On an equal protection challenge the first question is whether some fundamental right is involved. The answer determines the burden to be borne by the challenger....Without doubt, and plaintiffs agree, the state has a compelling interest in educating its youth....

For reasons we have already explained we think this vital state interest is served by the classification. Education is of transcendent importance to all children....

The educational needs of the children involved here are, as we have said, much different and much greater than the needs of Amish children. Even at school age there is much greater mixing by these children in general society. Some church members send their children to other schools, a matter which would ostracize children from Amish culture....

The principal difference is to consider the world for which the children here will have to be prepared. They will have to compete with well-educated children, will associate with them in a society very different from the simple, rural, and largely isolated one that lies ahead for Amish children. The state was fully justified in the classification. The equal protection challenge is rejected....

Affirmed.

A RANDOM CRIMINAL ACT OF A NON-STUDENT ENTERING A HIGH SCHOOL AND KILLING A STUDENT DOES NOT VIOLATE THE STUDENT'S CONSTITUTIONAL RIGHTS NOR CREATE A LIABILITY FOR THE SCHOOL DISTRICT.

Johnson v. Dallas Independent School District
38 F 3d 198 (1994)

United States Court of Appeals, Fifth Circuit

EDITH H. JONES, Circuit Judge:

Andrew Gaston's last moments on earth were passed in the hallway at A. Maceo Smith High School in Dallas, Texas. He was hit in the head by a stray bullet shot during a melee instigated by the killer, non-student Drumestic Contreal Brown. The question before this court is whether Gaston had either (1) a constitutional right not to be placed in danger of deadly violence while at school or (2) a more general constitutional right to some level of affirmative protection while at school. Despite our sympathy for Andrew's untimely death, we find no constitutional damage remedy available to his family.

The section 1983 case filed by Gaston's father against Dallas Independent School District [DISD] and Donnie Breedlove, the principal of Smith High, was dismissed for failure to state a claim....Brown went onto campus and into the high school building although he was not wearing a student ID badge required in some of DISD's schools. Further, Brown carried a concealed handgun, which was not discovered because the metal detectors placed by DISD at the school were not being used. Brown then created a disturbance, causing students--allegedly without the aid of school employees--to attempt to evict him. Gaston was tragically in the line of fire when Brown shot his gun.

The district court's conscientiously reasoned dismissal rested on three pivotal elements of a section 1983 claim. First, the court held, Gaston had no affirmative constitutional right to protection by DISD while he was at school. Second, because plaintiff had not pled that DISD's actions, custom, or policy caused Gaston's death, DISD could not be held constitutionally liable. Third, plaintiff had not pled facts sufficient to overcome principal Breedlove's assertion of qualified immunity....

The epidemic of violence in American public schools is a relatively new phenomenon, but one which has already generated considerable caselaw. Whether that epidemic invokes constitutional consequences for the innocent, law-abiding students forced to attend those schools raises grave questions that must be carefully analyzed.

To plead a constitutional claim for relief under section 1983, Gaston's father had to allege a violation of a right secured to Andrew by the Constitution or laws of the United States and a violation of that right by one or more state actors. Against the Dallas Independent School District, he had to allege that the unconstitutional custom or policy of DISD caused the violation. See Leffall....In this as in other similar cases, two potential theories of constitutional liability have been proposed. First, it may be contended that DISD and Principal Breedlove "violated [Andrew's] constitutional rights by affirmatively creating the hazardous environment" in which he attended school....Alternatively, Andrew's father asserts that the state bore Andrew an affirmative duty of care arising from the state's compulsory attendance laws. These theories will be discussed....

The key to the state-created danger cases...lies in the state actor's culpable knowledge and conduct in "affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid." Wideman...[states that] (state officials knowingly assigned violent, habitual sex offender to work alone with female prison employee and did not inform her of the risk). Thus the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's crime to occur. Put otherwise, the defendants must have been at least deliberately indifferent to the plight of the plaintiff....

...In DeShaney...the Supreme Court remarked, "while the state may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."...(emphasis added)....

...Even if the state-created danger theory is constitutionally sound, the pleadings in this case fall short of the demanding standard for constitutional liability. First, they posit the question whether the environment at Smith High School was "dangerous." If for no other reason, the presence of numerous trained adults would assure that a school cannot be as dangerous as the nocturnal condition of the high-crime neighborhood described in Wood or the prisoner release program gone awry in Cornelius. No inference of dangerousness arises simply from the presence of student ID badges or metal detectors; such devices could have been installed prophylactically, in the absence of any prior trespasses onto campus or incidents of criminal violence. Moreover, to infer the existence of a dangerous environment--the condition of section 1983 liability--solely from the presence of measures designed to avert violence would erect a serious disincentive to their use. The law cannot so turn against its purposes; the use of security devices should be encouraged, not discouraged. There would have to be allegations at least of previous criminal conduct at Smith

High School from which a trier of fact could conclude it was tantamount to a "high-crime area."

Second, school officials, must have actually known that Smith High was dangerous to students such as Andrew Gaston. Actual knowledge of a serious risk of physical danger to the plaintiff has been a common feature of the state-created danger cases. From the pleadings in this case, no legitimate inference can be drawn that school officials might have been actually aware of a high risk that an armed non-student invader would enter the campus and fire a pistol randomly during school hours.

Appellant's claim also fails the third element of the state-created danger cases. There is no pleading that school officials placed Gaston in a dangerous environment stripped of means to defend himself and cut off from sources of aid. There is no sufficiently culpable affirmative conduct. Andrew went to school. No state actor placed Andrew in a "unique, confrontational encounter" with a violent criminal. Cornelius. ...No official in the performance of her duties abandoned him in a crack house or released a known criminal in front of his locker. There is no suggestion that the school district or principal fostered or tolerated anarchy at Smith High--the ID badges and metal detectors permit the opposite inference. Even if the deployment of such security measures was haphazard or negligent, it may not be inferred that the conduct of the defendants rose to the level of deliberate indifference....[T]he most that may be said of defendants' ultimately ineffective attempts to secure the environment is that they were negligent, but not that they were deliberately indifferent....On the contrary, the facts here pleaded suggest only that Andrew was the tragic victim of random criminal conduct rather than of school officials' deliberate, callous decisions to interpose him in the midst of a criminally dangerous environment. Appellant's complaint, in short, does not suffice to plead that Andrew was the victim of state-created danger....

...[T]he Supreme Court...concluded that "a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." DeShaney.... The Court rejected the contention that a "special relationship," carrying affirmative constitutional obligations toward the child, existed....Such affirmative obligations of care and protection arise only when the state "takes a person into its custody and holds him there against his will."...The district court here concluded, as has every circuit court that has considered the issue, that DeShaney forecloses a constitutional claim on behalf of Andrew Gaston for affirmative protection while at school....

...Andrew Gaston's death is attributable to the fortuity that an armed, violent, non-student trespassed on campus. There can be no lability of state actors for this random criminal act unless the fourteenth amendment were to make the schools virtual guarantors of student safety--a rule never yet adopted even for those in society, such as a prisoners or the mentally ill or handicapped, who are the beneficiaries of a "special relationship" with the state....

For the foregoing reasons, the judgment of the district court is AFFIRMED.

A TEACHER MAY BE DISMISSED FOR DOCUMENTED INCOMPETENCE.

Johnson v. Francis Howell Board of Education
868 SW 2d 191 (1994)

Missouri Court of Appeals, Eastern District

SIMON, Presiding Judge.

Appellant, Barbara Johnson, appeals the judgment of the Circuit Court of St. Charles County affirming the decision of respondent, Francis Howell R-3 Board of Education (Board) terminating her employment as a permanent teacher....

In December 1991, appellant made videotapes of some of her classes (December videotapes), and administrators and teachers reviewed them with her and offered her their suggestions. From October 30, 1991 to March 17, 1992, the principal and/or assistant principal gave her seventeen memoranda specifying how she could improve based on over thirty of their observations. The observations were scheduled and unscheduled. The principal and assistant principal formally met with her twelve times to discuss her performance. The assistant principal also met with her four times to discuss her performance. The principal and the assistant principal also gave appellant the opportunity to respond in writing to the memoranda, and appellant did so. Appellant also participated in role playing with administrators and teacher.

...On February 21, 1992, the administrators made a summary of appellant's teaching progress up to that time based on over thirty documented observations. The summary was circulated only among the administrators and made the following conclusion:

> Rating based on a scale of 1-10, with 10 being the best
>
> The administration at Castlio school felt that [appellant's] overall performance as a teacher was rated as a 1.5 at the start of the process. Since the [warning letter] she has shown improvement, however, we would only rate her as 2.5...

Appellant's teaching was observed on February 27, March 2, 20, and 17. The assistant principal gave appellant memoranda praising her improvements and criticizing her deficiencies as seen during these observations.

After March 17, the administrators decided to recommend termination....

On June 15, 1992, the Board met and reviewed the transcript and the exhibits. The Board found that the principal and the assistant principal observed appellant's performance on numerous occasions during the probationary period and documented their observations and discussed them with appellant, who had an opportunity to reply orally and in writing. The Board also found that appellant completed the mechanical tasks required in the new plan, but did not demonstrate the requisite behavior changes in that she failed to: (1) maintain adequate classroom discipline; (2) give sufficient individualized attention to ensure that each student had an opportunity to learn; (3) convey prompt and accurate information about student performance; (4) provide positive information to and about students; and (5) emphasize the positive aspects of student conduct and performance. From these findings, the Board concluded that appellant demonstrated an inability to perform the duties of a professional teacher in a manner acceptable to it, and terminated her for incompetency and inefficiency. The Board noted that although some improvement took place in her performance after the warning letter, her improvement was not sufficient to raise her performance to a satisfactory level....

We review the findings and conclusions of the Board rather than the judgment of the Circuit Court....Our scope of review is limited to a determination of whether the decision of the Board is supported by substantial and competent evidence, whether the decision was arbitrary, capricious or unreasonable, or whether the administrative action constituted abuse of discretion.... Further, we must construe the evidence in the light most favorable to the Board's decision, together with all reasonable inferences where supported....If evidence before the Board would warrant either of two opposed findings, we are bound to the administrative determination, and it is irrelevant that there is evidence to support a contrary finding....In short, we may not substitute our judgment of the evidence....We also defer to the Board's determination of the credibility of the witnesses.... Finally, we note that "there is a strong presumption of validity in favor of a [Board's] decision because the courts are reluctant to interfere with the [the Board's] broad discretion in matters affecting school management."...

The record indicates that the Board found appellant failed to maintain classroom discipline, provide adequate individualized attention to students, and provide prompt and accurate information about student performance. From these findings, the Board concluded that appellant had performed incompetently and inefficiently during the probationary period....[W]e cannot say the Board used an inappropriate standard.

Finally appellant claims that her teaching had sufficiently improved to avoid termination. She contends that the students in her classes learned, as evidence by their standardized test averages. Appellant points out that she testified that she instituted new procedures to cure her problems with discipline, individual attention to students, and communication with parents and students. She noted that even the administrators acknowledged that appellant had improved her performance.

However, even assuming that the standardized test scores and appellant's testimony weigh in her favor, the principal's and assistant principal's evaluations, and the assistant principal's testimony, indicated that appellant still had teaching deficiencies through out the probationary period. Thus the Board's decision was based on sufficient evidence, and we defer to the Board's decision....

Judgment affirmed.

THE STATE MAY NOT DELEGATE ITS SCHOOL AUTHORITY TO A RELIGIOUS GROUP.

Board of Education of Kiryas Joel v. Grumet
114 SCt 2481 (1994)

Supreme Court of the United States

Justice SOUTER delivered the opinion of the Court.

The Village of Kiryas Joel in Orange County, New York, is a religious enclave of Satmar Hasidim, practitioners of a strict form of Judaism. The village fell within the Monroe-Woodbury Central School District until a special state statute passed in 1989 carved out a separate district, following village lines, to serve this distinctive population....The question is whether the Act creating the separate school district violates the Establishment Clause of the First Amendment, binding on the States through the Fourteenth Amendment. Because this unusual act is tantamount to an allocation of political power on a religious criterion and neither presupposes nor requires governmental impartiality toward religion, we hold that it violates the prohibition against establishment.

The Satmar Hasidic sect takes its name from the town near the Hungarian and Romanian border where, in the early years of this century, Grand Rebbe Joel Teitelbaum molded the group into a distinct community. After World War II and the destruction of much of European Jewry, the Grand Rebbe and most of his surviving followers moved to the Williamsburg section of Brooklyn, New York. Then, 20 years ago, the Satmars purchased an approved but undeveloped subdivision in the town of Monroe and began assembling the community that has since become the Village of Kiryas Joel. When a zoning dispute arose in the course of settlement, the Satmars presented the Town Board of Monroe with a petition to form a new village within the town, a right that New York's Village Law gives almost any group of residents who satisfy certain procedural niceties....Neighbors who did not wish to secede with the satmars objected strenuously, and after arduous negotiations the proposed boundaries of the Village of Kiryas Joel were drawn to include just the 320 acres owned and inhabited entirely by Satmars. The village, incorporated in 1977, has a population of about 8,500 today. Rabbi Aaron Teitelbaum, eldest son of the current Grand Rebbe, serves as the village rov (chief rabbi) and rosh yeshivah (chief authority in the parochial schools).

The residents of Kiryas Joel are vigorously religious people who make few concessions to the modern world and go to great lengths to avoid assimilation into it. They interpret the Torah strictly; segregate the sexes outside the home; speak Yiddish as their primary language; eschew television, radio, and English-language publications; and dress in distinctive ways that include headcoverings and special garments for boys and modest dresses for girls. Children are educated in private religious schools, most boys at the United Talmudic Academy where they receive a thorough grounding in the Torah and limited exposure to secular subjects, and most girls at Bais Rochel, an affiliated school with a curriculum designed to prepare girls for their roles as wives and mothers....

These schools do not, however, offer any distinctive services to handicapped children, who are entitled under state and federal law to special education services even when enrolled in private schools....Starting in 1984 the Monroe-Woodbury Central School District provided such services for the children of Kiryas Joel at an annex to Bais Rochel, but a year later ended that arrangement in response to our decisions in Aguilar v. Felton....Children from Kiryas Joel who needed special education (including the deaf, the mentally retarded, and others suffering from a range of physical, mental, or emotional disorders) were then forced to attend public schools outside the village, which their families found highly unsatisfactory. Parents of most of these children withdrew them from the Monroe-Woodbury secular schools, citing "the panic, fear and trauma [the children] suffered in leaving their own community and being with people whose ways were so different," and some sought administrative review of the public-school placements....

...[T]he New York Legislature passed the statute at issue in this litigation, which provided that the Village of Kiryas Joel "is constituted a separate school district,...and shall have and enjoy all the powers and duties of a union free school district. ..."...In signing the bill into law, Governor Cuomo recognized that the residents of the new school district were "all members of the same religious sect," but said that the bill was "a good faith effort to solve th[e] unique problem" associated with providing special education services to handicapped children in the village....

Although it enjoys plenary legal authority over the elementary and secondary education of all school-aged children in the village,...the Kiryas Joel Village School District currently runs only a special education program for handicapped children. The other village children have stayed in their parochial schools, relying on the new school district only for transportation, remedial education, and health and welfare services. If any child without handicap in Kiryas Joel were to seek a public-school education, the district would pay tuition to send the child into Monroe-Woodbury or another school district nearby. Under like arrangements, several of the neighboring districts send their handicapped Hasidic children into Kiryas Joel, so that two thirds of the full-time students in the village's public school come from outside. In all, the new district serves just over 40 full-time students, and two or three times that many parochial school students on a part-time basis.

Several months before the new district began operations, the New York State School Boards Association and respondents Grumet and Hawk brought this action against the State Education Department and various state officials, challenging Chapter 748 under the national and state constitutions as an unconstitutional establishment of religion....

A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of 'neutrality' toward religion,...favoring neither one religion over others nor religious adherents collectively over nonadherents.... Chapter 748, the statute creating the Kiryas Joel Village School District, departs from this constitutional command by delegating the State's discretionary authority over public schools to a group defined by its character as a religious community, in a legal and historical context that gives no assurance that governmental power has been or will be exercised neutrally....

The Establishment Clause problem presented by Chapter 748...resembles the issue raised in Larkin to the extent that the earlier case teaches that a State may not delegate its civic authority to a group chosen according to a religious criterion. Authority over public schools belongs to the State,...and cannot be delegated to a local school district defined by the State in order to grant political control to a religious group. What makes this litigation different from Larkin is the delegation here of civic power to the "qualified voters of the village of Kiryas Joel,"...as distinct from a religious leader such as the village rov, or an institution of religious government like the formally constituted parish council in Larkin. In light of the circumstances of this case, however, this distinction turns out to lack constitutional significance....

Because the district's creation ran uniquely counter to state practice, following the lines of a religious community where the customary and neutral principles would not have dictated the same result, we have good reasons to treat this district as the reflection of a religious criterion for identifying the recipients of civil authority. Not even the special needs of the children in this community can explain the legislature's unusual Act, for the State could have responded to the concerns of the Satmar parents without implicating the Establishment Clause, as we explain in some detail further on. We therefore find the legislature's Act to be substantially equivalent to defining a political subdivision and hence the qualification for its franchise by a religious test, resulting in a purposeful and forbidden "fusion of government and religious functions."...

The general principle that civil power must be exercised in a manner neutral to religion is one the Larkin Court recognized.

...

In finding that Chapter 748 violates the requirement of governmental neutrality by extending the benefit of a special franchise, we do not deny that the Constitution allows the state to accommodate religious needs by alleviating special burdens. Our cases leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to impositions that legitimate exercises of state power may place on religious belief and practice. Rather, there is "ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."...

But accommodation is not a principle without limits, and what petitioners seek is an adjustment to the Satmars' religiously grounded preferences that our cases do not countenance....

This conclusion does not, however, bring the Satmar parents, the Monroe-Woodbury school district, or the State of New York to the end of the road in seeking ways to respond to the parents' concerns....[T]here are several alternatives here for providing bilingual and bicultural special education to Satmar children. Such services can perfectly well be offered to village children through the Monroe-Woodbury Central School District. Since the Satmars do not claim that separatism is religiously mandated, their children may receive bilingual and bicultural instruction at a public school already run by the Monroe-Woodbury district. Or if the educationally appropriate offering by Monroe-Woodbury should turn out to be a separate program of bilingual and bicultural education at a neutral site near one of the village's parochial schools, this Court has already made it clear that no Establishment Clause difficulty would inhere in such a scheme, administered in accordance with neutral principles that would not necessarily confine special treatment to Satmars....

...[T]he New York Legislature...no doubt intended to accommodate the Satmar community without violating the Establishment Clause: we simply refuse to ignore that the method it chose is one that aids a particular religious community....

In this case we are clearly constrained to conclude that the statute before us fails the test of neutrality. It delegates a power this Court has said "ranks at the very apex of the function of a State,"..to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism. It therefore crosses the line from permissible accommodation to impermissible establishment. The judgment of the Court of Appeals of the State of New York is accordingly

Affirmed.

THE PUBLIC HAS A RIGHT TO SEE A TEACHER'S COLLEGE TRANSCRIPT.

Klein Independent School Dist. v. Mattox
830 F 2d 576 (1987)

United States Court of Appeals, Fifth Circuit

GARZA, CIRCUIT JUDGE:

...During the months of October and November of 1985, Dr. Donald Collins, the Superintendent of the Klein Independent School District, received two letters requesting copies of the "personnel file and other related public records" of Rebecca J. Holt. Ms. Holt is a public school-teacher employed by the school district. The requests were made pursuant to the Texas Open Records Act. Dr. Collins asked the Attorney General's Office for the State of Texas whether the contents of Ms. Holt's personnel file, particularly her college transcript, were public records subject to disclosure under state law. An Assistant Attorney General sent an opinion to Dr. Collins informing him that, in addition to the other documents, Ms. Holt's college transcript must be released according to the Texas Open Records Act. Moreover, such disclosure was not proscribed by the Family Educational Rights and Privacy Act of 1974 (FERPA)....

...Ms. Holt and the school district brought suit against Jim Mattox, the Attorney General for the State of Texas, alleging that he issued an opinion which, if followed, would cause the school district to act in violation of Ms. Holt's rights secured under FERPA and the First Amendment to the United States Constitution....

...[T]he district court granted the defendant's motion for summary judgment, and entered a final order dismissing the case....

...The appellants [alleged]...the court erred in finding that Ms. Holt's interest in maintaining the confidentiality of her academic record did not outweigh the public's interest in learning whether she is qualified to teach.

...It cannot be disputed that the statute was enacted to prevent an educational agency or institution from releasing the record of one of its own students. Excluded from FERPA's protections are records relating to an individual who is employed by an education agency or institution. Because Ms. Holt has not attended any school within the Klein Independent School District, the agency which has been directed to release her transcript, she cannot be considered a "student" under the FERPA definition. Rather, Ms. Holt's capacity with the school district is that of an employee. Because she is an employee and not a student of the institution requested to disclose her transcript, she does not fall within that class of people for whose benefit FERPA was created.

Ms. Holt's is not a "student" and her college transcript is not an "education record" protected from disclosure pursuant to FERPA's provisions....

...The Supreme Court has written that there are two different kinds of privacy interests. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions."...

The district court...[ruled] that Ms. Holt has a constitutional right to avoid disclosure of personal matters. The court then balanced Ms. Holt's privacy interest against the public's interest in knowing about her educational background. Although her file may contain "embarrassing or confidential information," the court noted, the public interest in learning whether those who teach young children are qualified clearly outweighs her limited right to disclosural privacy.

The appellants content that the public's interest can be vindicated through less intrusive means than presented in this case. The appellants propose that since her teaching certificate represents the informed judgment of the Texas Board of Education that she is qualified to teach, disclosure of the certificate itself fully serves the public's interest in being assured that those who teach are qualified....

The public's interest in disclosure of a schoolteacher's transcript is set forth in...the Texas Open Records Act...[which] make[s] provision for safeguarding the personal privacy of the individual....[T]he statue exempts from public disclosure "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy[.]" We do not find that the disclosure of a schoolteacher's college transcript rises to the level of that information which constitutes an unwarranted invasion of personal privacy....

We agree with the district court in tipping the balance in favor of the right of the public to know the academic records of the schoolteachers of their children. The appellants' reasoning concerning the regulations imposed by the Texas Legislature and the screening procedures of the Texas Board of Education is availing. Recently, there has been grave concern in Texas about the quality of public education, notwithstanding the state's regulations. Many teachers who had been certified and were teaching in Texas classrooms could not pass a basic test of minimal competency. In light of this apparent lack of competency prevalent in the state, the public must have full and complete information concerning the teachers who serve the public in educating their children....

Finding no merit in the appellants' claim...we AFFIRM the court's decision to grant summary judgment in this case.

EDUCATORS MAY CHOOSE ACCEPTED, PROVEN METHODOLOGY, CONTRARY TO PARENTS' DESIRES, IN EDUCATING A HANDICAPPED CHILD, WHERE SCHOOL OFFICIALS COMPLY WITH PROCEDURAL REQUIREMENTS OF EAHCA.

Lachman v. Illinois State Board of Education
852 F 2d 290 (1988)

United States Court of Appeals, Seventh Circuit

ESCHBACH, Senior Circuit Judge. Benjamin Lachman is a profoundly deaf seven-year-old child who resides within the district boundaries of the East Maine, Illinois School District....Since ...September 1984, his parents and the school district have disagreed as to the manner in which his education should be facilitated....

The Lachmans believe that Benjamin can best be educated at a neighborhood school near his home, in a regular classroom with the assistance of a full-time cued speech instructor. In contract, the school district has consistently proposed that all or at least half of Benjamin's school day be spend in a...self-contained classroom with other hearing-impaired children....

Cued speech is a technique for aiding hearing-impaired persons to understand spoken language. It is used in conjunction with speech (lip) reading and employs eight hand shapes held in four positions close to the mouth to clarify phonetic ambiguities.

In the Spring of 1976, with the approach of Benjamin's enrollment in kindergarten, the controversy between the Lachmans and the school district crystallized. Because the Lachmans did not agree with the Individual Education Program ("IEP") that the school district proposed for Benjamin, they initiated the due process review procedure....

On November 15, 1986, the Lachmans, as Benjamin's guardians, brought suit on his behalf....At its core, the complaint alleges that the IEP proposed by the...school district, and approved by the Illinois State Board of Education, fails to provide Benjamin with the free appropriate public education as required by... EAHCA [Education of All Handicapped Children Act]....

The district court fashioned its analysis along the lines of the Supreme Court's interpretation, in...Rowley...of the procedural and substantive requirements imposed by the EAHCA.

Based on...[its] analysis, the district dismissed the Lachmans' complaint. They appeal from that dismissal....

The district court correctly ascertained that Rowley, supra, is the definitive Supreme Court pronouncement to date as to the standards a school district must meet in order to satisfy its...obligation to provide all handicapped students with a free appropriate public education. In Rowley, the Court directed the lower courts to engage in the following two-part inquiry in suits, like the present one....

> First [the court must inquire whether] the State has complied with the procedures set forth in the Act[.] And second, [the court must ask] is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

...Appellants do not contend that the appellee education officials failed to comply with the procedures set forth in the Act....In determining whether the IEP proposed by the school district secures to Benjamin the right to a free appropriate free public education guaranteed him by...the Act, our analysis will be limited to the second Rowley inquiry....

Rowley makes clear that "once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the State."...Because the parties' disagreement as to the extent to which Benjamin is to be mainstreamed is inexorably intertwined with the cued speech and total communication methodologies, we must first ascertain which of those issues, if any, predominates here.

In order to divine the true crux of the dispute that prompted the present cause of action, we must establish the nature of the mainstreaming obligation created by...[the Act] and clarify the relationship of that statutory language to the general...requirement that handicapped children be provided with a free appropriate public education. Several post-Rowley decisions by the U.S. Courts of Appeals for the Sixth, Eighth and Ninth Circuits, as well as a small number of reported district court opinions, have addressed this topic....

...Relevant to our analysis is the observation in Roncher that the Act's "strong preference" for mainstreaming must be balanced against "the possibility that some handicapped children simply must be educated in segregated facilities either because...any marginal benefits from mainstreaming are far out-weighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting."

The remainder of the relevant reported case law...reflects a perception that the mainstreaming preference the statutory provision creates was not meant by Congress to be implemented in an unqualified manner. Instead, it is clear that the courts considering this issue have determined that the Act's mainstreaming preference is to be given effect only when it is clear that the education of the particular handicapped child can be achieved satisfactorily in the type of mainstream environment sought by the challengers to the IEP proposed for that child....

We are convinced that appellants' effort to characterize the sole, true issue in this case as whether the proposed IEP satisfies the...mainstreaming preference is misdirected....

The degree to which a challenged IEP satisfies the mainstreaming goal of the EAHCA simply cannot be evaluated in the abstract. Rather, that laudable policy objective must be weighed in tandem with the Act's principal goal of ensuring that the public schools provide handicapped children with a free appropriate education....A major part of the task of local and state officials in fashioning what they believe to be an effective program for the education of a handicapped child is the selection of the methodology or methodologies that will be employed. "The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the education method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardians of the child."...

The Lachmans' contention that their son can be fully mainstreamed rests squarely on their belief in, and preference for, the cued speech technique. They do not maintain that the fully-mainstreamed placement they seek would be possible without the use of cued speech and the utilization of a cued speech instructor working at Benjamin's side, full-time, in the classroom....The reasons relied on by the school district for refusing to place Benjamin in a regular classroom full-time focus on its lack of confidence in the cued speech technique as a means for facilitating immediate, full mainstreaming in Benjamin's case. Instead, the school district believes that the total communication concept is the most appropriate way to facilitate Benjamin's early primary education and it has selected that methodology for his IEP.

On the facts of this case, it is clear that the...issue of mainstreaming is subsumed by the parties' disagreement as to methodology. In the absence of the parties' difference of opinion as to that question of educational methodology, there would be no disagreement between them as to the extent of mainstreaming that could presently be achieved for Benjamin. Given the nature of the disagreement between the parties and the concomitant thrust of the Lachmans' cause of action, we can only conclude that the district court did not err when it framed its substantive analysis in a manner closely tracking the Rowley opinion, without expressly addressing the...mainstreaming issue.

We have determined that the core, dispositive issue in the controversy that underlies this cause of action is one centering on a disagreement between appellant parents and appellee school district as to the most appropriate method whereby the education of the parents' handicapped child is to be facilitated. Accordingly, in reviewing the decision of the court below, we, like the district court, must take great care to avoid displacing the education policy judgments made by appellees. That substantial deference to the decisions of those state and local public education officials is warranted here is confirmed by the statements of the Supreme Court in Rowley as to the role of the courts under the EAHCA in reviewing the decision made by state and local public education official....

The district court expressly found that defendant\appellee education officials had complied with the Act. Our review leads up to the same conclusion. Rowley and its progeny leave no doubt that parents, no matter how well-motivated, do not have a right under the EAHCA to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child....It is clear that the IEP proposed by the school district is based upon an accepted, proven methodology for facilitating the early primary education of profoundly hearing-impaired children. Further, nothing in the record indicates that the proposed IEP does not provide that Benjamin will be educated in a regular classroom environment to the maximum extent appropriate as required by...the Act. Given these findings, we conclude that the proposed IEP will provide Benjamin Lachman with a free appropriate public education as required by...the Act. Accordingly, the judgment of the district court is affirmed.

BASED UPON FREEDOM OF SPEECH, A LOCAL BOARD MAY NOT DENY USE OF A SCHOOL BUILDING TO A RELIGIOUS GROUP WHEN IT HAS A POLICY ALLOWING COMMUNITY GROUPS TO USE SCHOOL FACILITIES.

Lamb's Chapel v. Center Moriches Union Free School District
113 SCt 2141, (1993)

Supreme Court of the United States

JUSTICE WHITE delivered the opinion of the Court.

Section 414 of the New York Education Law authorizes local school boards to adopt reasonable regulations for the use of school property for 10 specified purposes when the property is not in use for school purposes. Among the permitted uses is the holding of "social, civic and recreational meetings and entertainments, and other uses pertaining to the welfare of the community; but such meetings, entertainment and uses shall be non-exclusive and open to the general public." The list of permitted uses does not include meetings for religious purposes....

Pursuant to section 414's empowerment of local school district, the Board of Center Moriches Union Free School District...has issued rules and regulations with respect to the use of school property when not in use for school purposes. The rules allow only 2 of the 10 purposes authorized by section 414: social, civic, or recreational uses (rule 10) and use of political organizations if secured in compliance with section 414 (rule 8). Rule 7, however, consistent with the judicial interpretation of state law, provides that "[t]he school premises shall not be used by any group for religious purposes."

The issue in this case is whether, against this background of state law, it violates the Free Speech Clause of the First Amendment, made applicable to the States by the Fourteenth Amendment, to deny a church access to school premises to exhibit for public viewing and for assertedly religious purposes, a film dealing with family and child-rearing issues faced by parents today.

Petitioners...are Lamb's Chapel, an evangelical church in the community of Center Moriches, and its pastor John Steigerwald. Twice the Church applied to the District for permission to use school facilities to show a six-part film series....A brochure provided on request of the District...stated that the film series would discuss [a commentator's] views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage. The brochure went on to describe the contents of each of the six parts of the series. The District denied the first application, saying that "[t]his film does appear to be church related and therefore your request must be refused." The second application for permission to use school premises for showing the film, which described it as a "Family oriented movie--from the Christian perspective," was denied using identical language.

[The District Court and the New York Court of Appeals held for the school district.]

...There is no question that the District, like the private owner of property, may legally preserve the property under its control for the use to which it is dedicated. It is also common ground that the District need not have permitted after-hours use of its property for any of the uses permitted by section 414 of the state education law. The District, however, did open its property for 2 of the 10 uses permitted by section 414. The Church argued below that because under Rule 10 of the rules issued by the District, school property could be used for "social, civic, and recreational" purposes, the District had opened its property for such a wide variety of communicative purposes that restrictions on communicative uses of the property were subject to the same constitutional limitations as restrictions in traditional public fora such as parks and sidewalks. Hence, its view was that subject-matter or speaker exclusions on District property were required to be justified by a compelling state interest and to be narrowly drawn to achieve that end. Both the District Court and the Court of Appeals rejected this submission, which is also presented to this Court. The argument has considerable force, for the District's property is heavily used by a wide variety of private organizations, including some that presented a "close question," which the Court of Appeals resolved in the District's favor, as to whether the District had in fact already opened its property for religious uses. We need not rule on this issue, however, for even if the courts below were correct in this respect--and we shall assume for present purposes that they were--the judgment below must be reversed.

With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes, we have said that "[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identify so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." The Court of Appeals appeared to recognize that the total ban on using District property for religious purposes could survive First Amendment challenge only if excluding this category of speech was reasonable and viewpoint neutral. The court's conclusion in this case was that Rule 7 met this test. We cannot agree with this holding, for Rule 7 was unconstitutionally applied in this case....

The Court of Appeals thought that the application of Rule 7 in this case was viewpoint neutral because it had been and would be applied in the same way to all uses of school property for religious purposes. That all religions and all uses for religious purposes are treated alike under rule 7, however, does not answer the critical question whether it discriminates on the basis of view point to permit school property to be used for the presentation of all views about family issues and child-rearing except those dealing with the subject matter from a religious standpoint.

There is no suggestion from the courts below or from the District or the State that a lecture or film about child-rearing and family values would not be a use for social or civic purposes otherwise permitted by Rule 10. That subject matter is not one that the District has placed off limits to any and all speakers. Nor is there any indication in the record before us that the application to exhibit the particular film involved here was or would have been denied for any reason other than the fact that the presentation would have been from a religious perspective. In our view, denial on that basis was plainly invalid...[in] that

> [a]lthough a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum...or if he is not a member of the class of speakers for whose special benefit the forum was created...the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

The film involved here no doubt dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the film dealt with the subject from a religious standpoint. The principle that has emerged from our cases "is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."...

The District, as a respondent, would save its judgment below on the ground that to permit its property to be used for religious purposes would be an establishment of religion forbidden by the First Amendment. This Court suggest in Widmar v. Vincent that the interest of the State in avoiding an Establishment Clause violation "may be [a] compelling" one justifying an abridgment of free speech otherwise protected by the First Amendment; but the Court went on to hold that permitting use of University property for religious purposes under the open access policy involved there would not be incompatible with the Court's Establishment Clause cases.

We have no more trouble than did the Widmar Court in disposing of the claimed defense on the ground that the posited fears of an Establishment Clause violation are unfounded. The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in Widmar, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental. As in Widmar, permitting District property to be used to exhibit the film involved in this case would not have been an establishment of religion under the three-part test articulated in Lemon v. Kurtzman. The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion, and does not foster an excessive entanglement with religion.

The District also submits that it justifiably denied use of its property to a "radical" church for the purpose of proselytizing, since to do so would lead to threats of public unrest and even violence. There is nothing in the record to support such a justification, which in any event would be difficult to defend as a reason to deny the presentation of a religious point of view about a subject the District otherwise makes open to discussion on District property....

The Attorney General also argues that there is no express finding below that the Church's application would have been granted absent the religious connection. This fact is beside the point for the purposes of this opinion, which is concerned with the validity of the stated reason for denying the Church's application, namely, that the film sought to be shown "appeared to be church related."...

Reversed.

SCHOOL-SPONSORED INVOCATION AND BENEDICTION AT GRADUATION CEREMONY IS UNCONSTITUTIONAL.

Lee v. Weisman
112 SCt 2649 (1992)

Supreme Court of the United States

JUSTICE KENNEDY delivered the opinion of the Court.

School principals in the public school system of the city of Providence, Rhode Island, are permitted to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and for high schools. The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment provisions the Fourteenth Amendment makes applicable with full force to the States and their school districts....

Deborah Weisman graduated from Nathan Bishop Middle School, a public school in Providence, at a formal ceremony in June 1989. She was about 14 years old....Acting for himself and his daughter, Deborah's father, Daniel Weisman, objected to any prayers at Deborah's middle school graduation, but to no avail. The school principal, petitioner Robert E, Lee, invited a rabbi to deliver prayers at the graduation exercises for Deborah's class....

It has been the custom of Providence school officials to provide invited clergy with a pamphlet entitled "Guidelines for Civic Occasions," prepared by the National Conference of Christians and Jews. The Guidelines recommend that public prayers at nonsectarian civic ceremonies be composed with "inclusiveness and sensitivity," though they acknowledge that "[p]rayer of any kind may be inappropriate on some civic occasions." The principal gave Rabbi Gutterman the pamphlet before the graduation and advised him the invocation and benediction should be nonsectarian....

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

This case does not require us to revisit the difficult question dividing us in recent cases, questions of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs as practices of many of its citizens. For without reference to those principals in other contexts, the controlling precedents as they relate to prayer and religious exercise in primary and secondary public schools compel the holding here that the policy of the city of Providence is an unconstitutional one. We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus we do not accept the invitation of petitioners and Amicus the United States to reconsider our decision in Lemon v. Kurtzman. The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us.

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." The State's involvement in the school prayers challenged today violates these central principles.

That involvement is as troubling as it is undenied. A school official, the principal, decided that an invocation and a benediction should be given; this a choice attributable to the State. The reason for the choice of a rabbi is not disclosed by the record, but the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent. Divisiveness, of course, can attend any decision respecting religions, and neither its existence nor its potential necessarily invalidates the State's attempts to accommodate religion in all cases. The potential for divisiveness is of particular relevance here though, because it centers around an overt religious exercise in a secondary school environment where, as we discuss below, subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.

The State's role did not end with the decision to include a prayer and with the choice of clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions," and advised him that his prayers should be nonsectarian. through these means the principal directed and controlled the content of the prayer. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State's displeasure in this regard. It is a cornerstone principal of our Establishment Clause jurisprudence that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government," Engel v. Vitale, and that is what the school officials attempted to do.

Petitioners argue, and we find nothing in the case to refute it, that the directions for the content of the prayers were a good-faith attempt by the school to ensure that the sectarianism which is no often the flashpoint for religious animosity be removed from the graduation ceremony. The concern is understandable, as a prayer which uses ideas or images identified with a particular religion may foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral. The school's explanation, however, does not resolve the dilemma caused by its participation. The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend....

The design of the Constitution is that preservation and transmission of religious reliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission....

Though the efforts of the school officials, whose effort to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject. Though the efforts of the school officials in this case to find common ground appear to have been a good-faith attempt to recognize the common aspects of religions and not the divisive ones, our precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students. Engel v. Vitale. And these same precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.

The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position. We turn our attention now to consider the position of the students, both those who desired the prayer and she who did not.

To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry. And tolerance presupposes some mutuality of obligation. It is argues that our constitutional vision of a free society requires confidence in our own ability to accept or reject ideas of which we do not approve, and that prayer at a high school graduation does nothing more than offer a choice....This argument cannot prevail, however. It overlooks a fundamental dynamic of the Constitution.

The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by insuring its pull expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed....

Our decisions in Engel v. Vitale and School District of Abington Tp. v. Schempp recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion....What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy....The government may no more use social pressure to enforce orthodoxy than it may use more direct means....

There was a stipulation in the District Court that attendance at graduation and promotional ceremonies is voluntary. Petitioners and the United States, as amicus, made this a center point of the case, arguing that the option of not attending the graduation excuses any inducement or coercion in the ceremony itself. The argument lacks all persuasion. Law reaches past formalism. And to say a teenage student has a real choice not at attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point.

Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts....

What for many of Deborah's classmates and their parents was a spiritual imperative was for Daniel and Deborah Weisman religious conformance compelled by the State. While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon ut. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands.

The Government's argument gives insufficient recognition to the real conflict of conscience faces by the young student. The essence of this importance it is the objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples, here by electing to miss the graduation exercise. This turns conventional First Amendment analysis on its head. It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice. To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high. Just as in Engel v. Vitale and School District of Abington Tp. v. Schempp, we found that provisions within the challenged legislation permitting a student to be voluntarily excused from attendance or participation in the daily prayers did not shield those practices from invalidation, the fact that attendance at the graduation ceremonies is voluntary in a legal sense does not save the religious exercise....

We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense along does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause. The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objective student had no real alternative to avoid....

The judgment of the Court of Appeals is affirmed.

THE COURT MAY EXTEND SOVEREIGN IMMUNITY TO PROTECT A TEACHER FROM LIABILITY IN STUDENT INJURY.

Lentz v. Morris
372 SE 2d 608 (1988)

Supreme Court of Virginia

COMPTON, Justice. The sole question presented in this appeal is whether the doctrine of sovereign immunity protects a high school teacher supervising a physical education class from a negligence action for damages brought by a student injured while a member of the class....

The plaintiff asserts that on November 9, 1984, the day of the injury, he was a student and defendant was a teacher of health and physical education at Kellam High School in Virginia Beach. He alleges that he was assigned to a physical education class conducted "under the supervision and in the presence of Defendant." He further asserts that, while participating, with the class in activities on school grounds, he and other students were "playing tackle football without wearing any protective equipment," which activity defendant knew or should have known posed danger to the participants. Plaintiff also alleges that as the result of defendant's negligent supervision and control of the physical education activities, he was "tackled with great force and violence" which caused his injuries.

...[P]laintiff contends that the trial court erred in ruling that a school teacher is entitled to immunity "for his own act of negligence."...

...[T]he plaintiff urges, "Insulation of this individual from responsibility for his own negligent acts does not achieve any of the purposes for which immunity is ordinarily extended to governmental employees." We do not agree.

Messina v. Burden...was a watershed decision on the subject of sovereign immunity. In that case, we reviewed our prior decisions stemming from diverse factual settings and attempted to reconcile them. Reasserting the viability of the doctrine in the Commonwealth, we endeavored to explicate the circumstances under which "an employee of a governmental body is entitled to the protection of sovereign immunity," given the facts of the cases under consideration in Messina....

Initially, we focused upon the purposes served by the doctrine. They include "protecting the public purse, providing for smooth operation of government, eliminating public inconvenience and danger that might spring from officials being fearful to act, assuring that citizens will be willing to take public jobs, and preventing citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation."...We then said that in order to fulfill those purposes, the reach of the doctrine could not be limited solely to the sovereign but must be extended to "some of the people who help run the government."...We noted that because the government acts only through individuals, it could be crippled in its operations if every government employee were subject to suit.

In Messina, against the background of the purposes of the doctrine, the general principles applicable to the concept, and the facts and circumstances of the cases at hand, we proceeded to engage in a necessary "line-drawing" exercise to determine which government employees were entitled to immunity. Thus, in one case, we held that a State supervisory employee who was charged with simple negligence while acting within the scope of his employment was immune, there being no charge of gross negligence or intentional misconduct....

In the other Messina case, supra, we decided that an employee of a county, which shares the immunity of the State, was entitled to the benefits of sovereign immunity where his activities clearly involved the exercise of judgment and discretion....In deciding that case, we outlined the test,...to be used to determine entitlement to immunity. The factors to be considered include: (1) the nature of the function the employee performs; (2) the extent of the governmental entity's interest and involvement in the function; (3) the degree of control and direction exercised by the governmental entity over the employee; and (4) whether the alleged wrongful act involved the exercise of judgment and discretion....

We hold the trial court correctly ruled that the health and physical education teacher in this case was immune from suit. The facts expressly alleged, and the inferences flowing from those facts, state the following case....The facts do not support a charge of either gross negligence or intentional misconduct. In addition, and contrary to the contention of the plaintiff on brief, implicit in the facts alleged is the conclusion that the defendant was acting within the scope of his employment at the time of the injury.

...The governmental entity employing the teacher, the local school board, has official interest and direct involvement in the function of student instruction and supervision, and it exercises control and direction over the employee through the school principal....

...[T]he Messina test...mandates immunity for this defendant. If school teachers performing functions equivalent to this defendant are to be haled into court for the conduct set forth by these facts, fewer individuals will aspire to be teachers, those who have embarked on a teaching career will be reluctant to act, and the orderly administration of the school systems will suffer, all to the detriment of our youth and the public at large.

For these reasons, the judgment of the trial court will be

Affirmed.

A STUDENT RAPE VICTIM IS ENTITLED TO DAMAGES FROM THE PERPETRATOR BUT NOT FROM THE SCHOOL.

L.K. and L.K. v. Reed
631 S 2d 604 (1994)

Court of Appeal of Louisiana, Third Circuit

GUIDRY AND YELVERTON, JJ., BERTRAND, J. Pro Tem.
LUCIEN C. BERTRAND, JR., Judge Pro Tem.

On February 4, 1991, A.K. and Harry Reed were both special education students at Pine Prairie School. A.K. was a 13 year old seventh grader and Harry was a 19 year old junior. Harry testified that he was in the special education program because of a learning disability. A.K. is classified as mildly mentally retarded with an IQ in the range of 64-74. Although they are not in the same class, A.K. and Harry knew each other and conversed on occasion.

The plaintiffs' position in this case is that A.K. was forced to have sex with Harry through coercion and intimidation. A.K. testified that on the morning of February 4, two girls in her class took her by the hand to an old storage building at the back of the campus and told her to have sex with Harry Reed. A.K. testified that physical harm was threatened if she did not comply. A.K. then said that Harry was inside the building waiting for her, and when she arrived, he took off her clothes and they had sex. She verbally protested and cried, but did not attempt an escape or otherwise try to prevent the act. Essentially the same events occurred approximately five hours later during the noon recess.

The defendants attempted to prove that the sexual acts were consensual and were initiated by A.K. Harry testified that on February 4, while riding the bus to school, he was approached by one of A.K.'s classmates who told him A.K. wanted to have sex with him. He agreed to have sex with A.K. and discussed with one of his own classmates potential locations. Through these intermediaries, Harry arranged to meet A.K. at the storage building before classes started and again at the noon recess whereupon they had sex on both occasions. He testified that he did not force A.K. to have sex, nor did she protest in any way.

The girls involved with A.K. that morning generally testified it was A.K.'s idea to have sex with Harry and that she was not upset by the events of February 4. Harry's classmate testified that he went with Harry, A.K., and Nicole Fontenot to the storage building to "make love." He and Nicole kissed and he did not know what Harry and A.K. did.

Two days later, A.K. told her parents what had happened. Her father immediately went to the sheriff's office to press charges against Harry Reed. As a result, Reed pled guilty to carnal knowledge of a juvenile and received a probationary sentence. A.K.'s parents took her out of school and began teaching her at home. A.K. and Harry have not spoken to each other since the February 4 incidents.

As damages, plaintiffs allege that A.K. has suffered psychological injuries and a recurrence of a pre-existing seizure disorder. Dr. Reuben Roy, an adolescent psychiatrist who saw A.K. three weeks after the incidents at issue and again two years later, described her as immature, infantile, and dependent, and diagnosed her as suffering from depression and post traumatic stress disorder. He said that she has low self esteem and is aphonic, meaning that she speaks hardly at all. When asked if he thought A.K. might have consented to the sexual acts with Reed, Dr. Roy stated:

> [T]hat this girl would voluntarily engage in sex at all would be like for me to imagine a Volkswagen flying. Of course, it is possibly possible, but it is beyond the realm of my comprehension that she would have.

Dr. Stuart Kutz, a psychologist who tested and evaluated A.K. on three occasions almost two years after the sexual activities occurred, characterized A.K. as severely depressed, anxious, shy, compliant, and suffering from post traumatic stress disorder. He attributed her depression and stress to the assaults by Reed and said that she had relatively few coping skills to rely on. He said that she is not the type of youngster who would have made a decision to have sex in the daytime at school. However, Dr. Kutz did say that she could have been intimidated into such an activity:

> Well, if you couple her limited intellectual functioning with her personality style, I believe that it is possible for a youngster like that to be intimidated into behaving in ways that are contrary to what they would like to do or to what they know is right and wrong.

The plaintiffs also presented the testimony of Mr. Samuel Fusilier, a licensed clinical social worker. He, too, thought that A.K. was depressed as a result of these incidents. He described her as "not a very happy person" and recommended further treatment as did Drs. Kutz and Roy.

The defendants did not dispute the diagnosis and evaluations of A.K.'s psychological condition. However, they argued that her problems are the result of guilt from having participated in consensual sexual conduct. They further argued that her strict Pentecostal upbringing caused her to rebel and then to suffer from guilt as a result of her rebellion. However, the defendants did not present any evidence in support of this theory....

We address briefly at the outset the dismissal of the plaintiffs' suit against the School Board. We agree with the trial judge's factual finding that the School Board properly supervised its students. Constant and/or individual supervision is not required by law and, as a practical matter, could not be carried out....We further agree with the trial judge's conclusion that the building in question, regardless of its condition, did not cause the plaintiffs' damages. Therefore, there can be no liability on the part of the School Board....

AFFIRMED....

SCHOOL BOARD HAS DISCRETIONARY POWER TO BAN FROM SCHOOLS MILITARY RECRUITERS WHO DISCRIMINATE ON THE BASIS OF SEXUAL ORIENTATION.

Lloyd v. Grella
634 NE 2d 171 (1994)

Court of Appeals of New York

BELLACOSA, Judge.

The Rochester City School Board revolved that employers, including the military, who discriminate on the basis of sexual orientation or other reasons shall be barred from school site student recruitment. Education Law section 2-a grants military recruiters access to educational venues "on the same basis" as all other employment recruiters.

Petitioner Lloyd, on behalf of her son who has graduated from the Rochester schools, sued, urging that Education Law section 2-a invalidates the Rochester City School Board Resolution. The Supreme Court, whose judgment and opinion were adopted by the Appellate Division, agreed and granted the petition, in effect allowing unqualified military access. This Court granted leave to appeal and now reverses and dismisses the petition. We hold that Education Law section 2-a does not override the local Resolution.

In August 1984, Education Law 2-a was enacted to ensure equal access for the military to educational institutions so that students would be able to acquire direct information about military employment opportunities....The law was enacted to overcome the particular discriminatory exclusion of the military from schools for recruitment purposes. Education Law section 2-a states in part:

> Notwithstanding any other provision of law to the contrary, if a trustee, president, principal,...or a board of education...permits the release of directory information relating to pupils or permits access to school buildings, school grounds or other school property to persons who inform pupils of educational, occupational or career opportunities, such trustee, president, principal, officer, board or administrator shall provide access to directory information relating to pupils and access to such school property on the same basis for official representatives of the state militia and the armed forces of the United States for the purpose of informing pupils of educational, occupational or career opportunities within the state militia or armed forces of the United States (emphasis added).

In December 1991, the Rochester City School District Board of Education adopted a Resolution...directed largely at the military's open, long-standing and uncontroverted discriminatory policies. Its interdiction of the military's recruitment opportunities at school sites includes in relevant parts:...

> 2. No organization shall be permitted in any City School District building for the purpose of recruiting City School District students if such organization has a stated policy which discriminates against any person on the basis of race, color, religion, handicap, sex, creed, political beliefs, age, economic status, or sexual orientation, until such time as these discriminatory policies are discontinued....
> 8. All secondary schools have the responsibility of notifying students annually of the Armed Forces policy of discriminating against persons on the basis of sexual orientation, as stated in Department of Defense Directive 1332.14, or as subsequently amended or modified, which provides, in pertinent part, that: 'Homosexuality is incompatible with military service.'...

The Policy gives direct emphasis to the salient portions of the Department of Defense Directive...which include the assertion that "[h]omosexuality is incompatible with military service"....

Parent and natural guardian Lloyd, on her son's behalf, seeks a judgment compelling the officials of the Rochester school system to allow mandated duties and admit military employment recruiters to their school sites....

...We...conclude that the school here exercised a discretionary power to exclude all recruiters engaging in promulgated discrimination, as the still-evolving military policy does.

We acknowledge that our holding eliminates Education Law section 2-a as an obstacle to the challenged Policy which bars discriminating military recruiters and others from schools in Rochester....

We are also satisfied that the holdings of the Appellate Division and the Supreme Court undermine well-settled principles protecting the discretion traditionally reposed in local school districts regarding access to students on school property. The long-standing deference afforded local school boards to exercise ultimate authority for access to students, school buildings and school property generally is well founded....

This feature of our analysis adds persuasive support for our holding. The military may recruit on Rochester school grounds "on the same basis" as any other employer when it conforms to the nondiscriminatory practices and policies applicable to all recruiters. The statute and the Policy are not in conflict in that regard and can be read and interpreted as compatible when properly so read and interpreted. In effect, we confidently conclude that Education Law section 2-a does not tolerate the contradiction of encouraging the efforts of schools in inculcating an abhorrence of discrimination, while compelling the admittance of openly discriminating potential employers.

Mandamus is not available here because the Policy enacted by the local school board was a permissible discretionary action not in contradiction of or forbidden by Education Law....

Accordingly, the order of the Appellate Division should be reversed....

SCHOOL CENSORSHIP OF PROFANITY IN A STUDENT-MADE FILM DOES NOT VIOLATE STUDENT'S FREE SPEECH RIGHTS.

Lopez v. Tulare Joint Union High School District Board
40 Cal Rptr 2d 762 (1995)

Court of Appeal, Fifth District

HARRIS, Associate Justice.

...Lillian Lopez, Oscar Maldonado, Adriann McGrew and Sarah Valenzuela (plaintiffs or students) were students at Valley High School, a continuation school in the Tulare Joint Union High School District. During the 1991-1992 academic year, the students wrote and produced a film entitled Melancholianne in connection with a Film Arts class. The film, intended to address the problems of teenage pregnancy, essentially depicts a day in the life of the teenage parents, Christianne and Padron, and their baby, Melancholianne....

The students, with the assistance of the American Civil Liberties Union, brought an action against the school district board of trustees and the school administrators (collectively the Board) for declaratory and injunctive relief challenging the authority of the Board to censor the videotape script....

Because there were no material facts in dispute, the parties filed cross motions for summary judgment. The court (Judge Sevier) granted the Board's motion for summary judgment and denied the students' motion. In ruling for the Board, the court found: (1) the students' free speech rights under [California law] are no greater than those guaranteed by the United States Constitution; (2) while students have recognized free speech rights, school districts may limit certain types of speech....; (3) the Board may prohibit the words and phrases: "fuck," "shit," "bitch," "son-of-a-bitch," "ass," and "tit" in a student video production because they constitute "obscene expression" as a matter of law...; and (4) those words and phrases may also be prohibited...because they constitute a per se violation of lawful school regulations....

The First Amendment of the United States Constitution provides in part: "Congress shall make no law...abridging the freedom of speech...." Article I, section 2, subdivision (a) of the California Constitution (hereafter, article I, section 2(a)) guarantees that "[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

The purpose of both the First Amendment and article I section

2(a) was to abolish governmental censorship and to constitutionalize society's substantial interest in protecting the right to comment on issues of public concern....

...The Tinker court recognized that school officials generally had comprehensive authority to prescribe and control conduct in the schools, but this authority did not extend to administrative censorship of public school students' nondisruptive expression. Students did not "shed their constitutional right to freedom of speech or expression at the school house gate." Thus, although students' First Amendment rights had to be "applied in light of the special characteristics of the school environment," students could not be "confined to the expression of those sentiments that are officially approved."...

The court declared that students may exercise their rights to freedom of expression unless the "conduct by the student, in class or out of it, which for any reason--whether it stems from time, place or type of behavior--materially disrupts classwork or involved substantial disorder or invasion of the rights of others...."...

...[T]he United States Supreme Court held that the First Amendment did not prevent a school district from disciplining a high school student who gave a lewd speech at a school assembly. Bethel....In Bethel, a high school student gave a nominating speech during a school assembly as part of a school-sponsored program in self-government. The student referred to his candidate "in terms of an elaborate, graphic, and explicit sexual metaphor."...The student was disciplined for violating a school's rule which prohibited the use of obscene and profane language....The Supreme Court held the sanctions did not violate the student's First Amendment rights.

Under the First Amendment, adults, making what the speaker considers a political point, cannot be prohibited from using an offensive form of expression. But the same latitude need not be permitted to children in a school....The freedom to advocate unpopular and controversial views must be balanced against "the society's countervailing interest, in teaching students the boundaries of socially appropriate behavior."...Further, the determination of what manner of speech in a classroom or school assembly is inappropriate properly rests with the school board....

In a similar view, in Hazelwood...the court upheld a school principal's authority to delete articles, describing students' experiences with pregnancy and the impact of divorce on students, from the school newspaper which was written and edited by the journalism class. The court held the newspaper was not a public forum. School facilities may be deemed public forums only if school authorities have by policy or practice opened those facilities for indiscriminate use by the general public or some segment of it. Here, the authorities reserved the forum for its intended purpose--a supervised learning experience for journalism students. They were entitled to regulate the contents of the newspaper in any reasonable manner....

The Court concluded that educators are entitled to exercise greater control over...student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school....A school may in its capacity as publisher of a school newspaper or producer of a school play "'disassociate itself'" from speech that would substantially interfere with its work or impinge upon the rights of other students, or from speech that is ungrammatical, poorly written, biased, vulgar or profane, or unsuitable for immature audiences....Accordingly, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."...

...*Melancholianne* is conceptually no different than a school yearbook or newspaper produced in a journalism class. While the primary purpose for producing the videotape is to teach the students writing and film-making skills, by tradition, the film also has served as an avenue of student expression on a topic of interest to students. Past films addressed drugs, satanic cults and irrigation battles and were shown to the student body and off-campus to the community. Thus, there is no reason to distinguish the student film from the student newspaper for forum analysis purposes; *Melancholianne* is a limited public forum.

When a school publication is deemed to be a limited public forum, school officials must demonstrate that the particular regulation of student expression advances a compelling state interest. In the educational setting, the compelling state interest advanced is usually the interest in maintaining an environment where the educational process may occur without disruption and teaching students the boundaries of socially appropriate behavior. *Bethel*....Here, the Board asserts a compelling state interest in fulfilling its basic educational mission which includes promoting "moral improvement" and teaching students to refrain from the use of profane and vulgar language....That interest is a valid pedagogical objective.

School officials must also show that speech regulations are narrowly drawn to achieve the compelling interest....The Board has done so here. The Board has not censored the students' expression of ideas; rather the Board has prohibited their expression of those ideas by the use of profane language. The Board's directive cannot be construed as the type of censorship which the California courts have deemed unconstitutional--censorship based on a disagreement with the views presented, or to avoid criticism of Board policy, or to avoid discussion of controversial issues. Rather, the Board's directive was content neutral and served a valid pedagogical objective....

For all these reasons, the Board's directive to the Film Arts class teacher to have the students remove the profane language from the _Melancholianne_ script was proper....

The judgment is affirmed....

WHEN SCHOOL OFFICIALS HAVE REASONABLE SUSPICION A STUDENT HAS A WEAPON IN SCHOOL, EVIDENCED BY THE SHAPE OF A GUN IN A BOOK BAG, A SEARCH OF A STUDENT'S PROPERTY IS JUSTIFIED.

Matter of Gregory M.
606 NYS 2d 579 (1993)

Court of Appeals of New York

LEVINE, Judge.

There is no dispute over the facts giving rise to appellant's adjudication of juvenile delinquency upon his admission to an act that, if committed by an adult, would constitute criminal possession of a weapon in the fourth degree. On November 29, 1990, appellant, then 15 years old, arrived at the high school he attended in The Bronx without a proper student identification card. He was directed by a school security officer to report to the office of the Dean to obtain a new card. In accordance with school policy, he was required to leave his cloth book bag with the security officer until he had obtained the proper identification. When appellant tossed the book bag on a metal shelf before proceeding beyond the school lobby to the Dean's office, the security officer heard a metallic "thud" which he characterized as "unusual." He ran his fingers over the outer surface of the bottom of the bag and felt the outline of a gun. The security officer then summoned the Dean who also discerned the shape of a gun upon feeling the outside of appellant's book bag. The bag was brought to the Dean's office and opened by the head of school security, revealing a small hand gun later identified as a .38 Titan Tiger Special.

A juvenile delinquency petition was filed in Family Court accusing appellant of acts constituting criminal possession of a weapon in the second, third, and fourth degrees, defacement of a weapon and unlawful possession of a weapon by a person under age 16. Family Court denied appellant's motion to suppress the gun....Family Court placed appellant with the Division for Youth.

On appeal, the Appellate Division upheld Family Court's denial of appellant's motion to suppress....It held that the unusual metal thud heard by the security officer when appellant deposited his book bag was sufficient to support a reasonable suspicion that the bag contained a weapon, thereby justifying a "frisk" of the outside of the bag. The Court further ruled that when the frisk touching revealed the presence in the bag of an object that felt like a gun, the school authorities were justified in searching the inside of the bag....

We affirm....[A]ppellant is quite correct in contending that the metallic thud heard by the security officer when appellant put the book bag down was by itself insufficient to furnish a reasonable suspicion that the bag contained a weapon. We conclude, however, that a less rigorous premonition concerning the contents of the bag was sufficient to justify the investigative touching of the outside of the bag. When that touching disclosed the presence of a gun-like object in the bag, there was reasonable suspicion to justify the search of the inside of the bag....

We agree that for searches by school authorities of the persons and belongings of students, such as that conducted in *New Jersey v. T.L.O.*...the reasonable suspicion standard adopted in that case for Fourth Amendment purposes is...appropriate....In the instant case, however, the investigative touching of the outer surface of appellant's book bag falls within a class of searches far less intrusive than those which, under *New Jersey v. T.L.O*, require application of the reasonable suspicion standard. Applying the balancing process required under *People v. Scott D*...and *New Jersey v. T.L.O.*..., it is undeniable that appellant had only a minimal expectation of privacy regarding the outer touching of his school bag by school security personnel, even for purposes of learning something regarding its contents, when he left the bag with the security officer pursuant to the school policy requiring this until he obtained a valid identification card. On the other hand, it seems equally undeniable that, in the balancing process, prevention of the introduction of hand guns and other lethal weapons into New York City schools such as this high school is a governmental interest of the highest urgency. The extreme exigency of barring the introduction of weapons into the schools by students is no longer a matter of debate.

Thus, the balancing process ordained by *People v. Scott D.*...and *New Jersey v. T.L.O.*...leads to the conclusion that a less strict justification applies to the limited search here than the reasonable suspicion standard applicable for more intrusive school searches....

Because appellant's diminished expectation of privacy was so clearly outweighed by the governmental interest in interdicting the infusion of weapons in the schools we think the "unusual" metallic thud heard when the book bag was flung down--quite evidently suggesting to the school security officer the possibility that it might contain a weapon--was sufficient justification for the investigative touching of the outside of the bag, thus rendering that limited intrusion *reasonable* (and not based on mere whim or caprice) for constitutional purposes....Once the touching of the outer surface of the bag revealed the presence of a gun-like object inside, school authorities had a *reasonable suspicion* of a violation of law justifying the search of the contents of the bag....

...[T]he order of the Appellate Division brought up for review should be affirmed....

A COACH MAY RECOVER DAMAGES WHERE A NEWSPAPER FALSELY IMPLIES, WITHOUT PROOF, THE COACH LIED UNDER OATH.

Milkovich v. Lorain Journal Co.
110 SCt 2695 (1990)

Supreme Court of the United States

Chief Justice REHNQUIST delivered the opinion of the Court. Respondent J. Theodore Diadiun authored an article in an Ohio newspaper implying that petitioner Michael Milkovich, a local high school wrestling coach, lied under oath in a judicial proceeding about an incident involving petitioner and his team which occurred at a wrestling match. Petitioner sued Diadiun and the newspaper for libel, and the Ohio Court of Appeals affirmed a lower court entry of summary judgment against petitioner. This judgment was based in part on the grounds that the article constituted an "opinion" protected from the reach of state defamation law by the First Amendment of the United States Constitution. We hold that the First Amendment does not prohibit the application of Ohio's libel laws to the alleged defamations contained in the article.

This case is before us for the third time in an odyssey of litigation spanning nearly 15 years....[R]espondent Diadiun's column appeared in the News-Herald, a newspaper which circulates in Lake County, Ohio, and is owned by respondent Lorain Journal Co. The column bore the heading "Maple, beat the law with the 'big lie,'"...The column contain the following passages:

> ...a lesson was learned (or relearned) yesterday by the student body of Maple Heights High School, and by anyone who attended the Maple-Mentor wrestling meet of last Feb. 8
>
> A lesson which, sadly, in review of the events of the past year, is well they learned early.
>
> It is simply this: If you get in a jam, lie your way out.
>
> If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.
>
> The teachers responsible were mainly Maple wrestling coach, Mike Milkovich, and former superintendent of schools, H. Donald Scott....
>
> Anyone who attended the meet, whether he be from Maple Heights, Mentor, or impartial observer, knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.
>
> But they got away with it.

> Is that the kind of lesson we want our young people learning from their high school administrators and coaches?
>
> I think not....

Petitioner commenced a defamation action against respondents...alleging that the headline of Diadiun's article and the 9 passages quoted above "accused plaintiff of committing the crime of perjury, an indictable offense in the State of Ohio, and damaged plaintiff directly in his life-time occupation of coach and teacher, and constituted libel per se."...

Since the latter half of the 16th century, the common law has afforded a cause of action for damage to a person's reputation by the publication of false and defamatory statements....

...[D]ue to concerns that unduly burdensome defamation laws could stifle valuable public debate, the privilege of "fair comment" was incorporated into the common law as an affirmative defense to an action for defamation. "The principle of 'fair comment' afford[ed] legal immunity for the honest expression of opinion on matters of legitimate public interest when based upon a true or privileged statement of fact."...The privilege of fair comment applied only to an expression of opinion and not to a false statement of fact, whether it was expressly stated or implied from an expression of opinion."...Thus under the common law, the privilege of "fair comment" was the device employed to strike the appropriate balance between the need for vigorous public discourse and the need to redress injury to citizens wrought by invidious or irresponsible speech.

In 1964, we decided in New York Times Co. v. Sullivan...that the First Amendment to the United States Constitution placed limits on the application of the state law of defamation. There the Court recognized the need for "a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not."...

Three years later, in Curtis Publishing Co. v. Butts...a majority of the Court determined "that the New York Times test should apply to criticism of 'public figures' as well we 'public officials.'...

The next step in this constitutional evolution was the Court's consideration of a private individual's defamation actions involving statements of public concern. Although the issue was initially in doubt,...the Court ultimately concluded that the New York Times malice standard was inappropriate for a private person attempting to prove he was defamed on matters of public interest....

...[T]he Court believed that certain significant constitutional protections were warranted in this area. First, we held that the States could not impose liability without requiring some showing of fault....Second, we held that the States could not permit recovery of presumed or punitive damages on less than a showing of New York Times malice....

Still later, in Philadelphia Newspapers, Inc. v. Hepps,...we held "that the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."...In other words, the Court fashioned "a constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages."...Although recognizing that "requiring the plaintiff to show falsity will insulate from liability some speech that is false, but unprovably so," the Court believed that this result was justified on the grounds that "placement by state law of the burden of proving truth upon media defendants who publish speech of public concern deters such speech because of the fear that liability will unjustifiably result."...

Respondents would have us recognize, in addition to the established safeguards discussed above, still another First Amendment protection for defamatory statements which are categorized as "opinion" as opposed to "fact."...

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; and the statement, "In my opinion Jones is a liar," can cause as much damage to reputation as the statement, "Jones is a liar." As Judge Friendly aptly stated: "[It] would be destructive of the law of libel if a writer could escape liability for accusations of [defamatory conduct] simply by using, explicitly or implicitly, the words 'I think.'"...

We are not persuaded that,...an additional separate constitutional privilege for "opinion" is required to ensure the freedom of expression guaranteed by the First Amendment. The dispositive question in the present case then becomes whether or not a reasonable factfinder could conclude that the statements in the Diadiun column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative....

We also think the connotation that petitioner committed perjury is sufficiently factual to be susceptible of being proved true or false....

The numerous decisions discussed above establishing First Amendment protection for defendants in defamation actions surely demonstrate the Court's recognition of the Amendment's vital guarantee of free and uninhibited discussion of public issues. But there is also another side to the equation; we have regularly acknowledged the "important social values which underlie the law of defamation," and recognize that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation."...

We believe our decision in the present case holds the balance true. The judgment of the Ohio Court of Appeals is reversed....

A NEW YORK SCHOOL DISTRICT HAS A DUTY TO SUPERVISE STUDENTS AT DISMISSAL AND IS LIABLE FOR FORESEEABLE INJURIES CAUSED BY A STUDENT'S ASSAULT.

Mirand v. City of New York
637 NE 2d 263 (1994)

Court of Appeals of New York

CIPARICK, Justice.

This appeal requires us to consider the nature and extent of the tort liability of a school district based on the theory of negligent supervision for injuries caused to plaintiffs by the intentional acts of a fellow student....

Plaintiffs Virna and Vivia Mirand, sisters, were students at Harry S. Truman High School in the Bronx at the time of the incident giving rise to this action. According to Virna's testimony, on September 20, 1982, she was released from her last class at 2:00 P.M. and went to wait for her sister, whose last class ended at 2:40 P.M. at their usual meeting place. On the way there, Virna accidentally bumped into Donna Webster, another student with whom Virna had not had any previous encounters. Although Virna apologized, Webster, believing the contact to be intentional, cursed Virna and attempted to kick her. Virna blocked the kick and caught Webster's leg. According to Virna, Webster threatened to kill her. At that point a bystander intervened and prevented anything further from occurring.

Virna proceeded to the first floor of the school where by chance she met her sister who was going to her last class. Webster was a student in Vivia's class and Vivia suggested that Virna report the altercation to the security office. Virna proceeded to the security office, which was located on the first floor near the building entrance, and knocked on the door. She received no response. Virna testified that as she was walking down a first floor hallway she met a woman she knew to be an art teacher but whose name she could not recall. She told the teacher of the altercation with Webster, that Webster had threatened her, and that there was no one in the security office. Virna was not allowed to testify regarding what the art teacher said in response. Virna conceded at this point that, in an examination before trial made six years earlier, she had not mentioned her meeting with the art teacher.

According to Virna, after her encounter with the art teacher, she returned to the security office, where again she knocked on the door and received no response. She then went to the second floor and left the building through the main entrance to wait for her sister on the building veranda where school security officers were sometimes present. None were present on that day. Vivia eventually arrived about a half hour later and the two proceeded to descend the staircase when they found their path blocked by Webster and two male companions. Although the sisters tried to avoid her, Webster approached Virna and struck her on the elbow and head with a hammer. When Vivia tried to seize the hammer, she was hit in the back by an unknown girl. One of the males with Webster, a nonstudent, later identified as her brother, stabbed Vivia through the wrist with a knife. No security or police officers were present during the incident. The sisters were taken to a hospital. Virna was treated and released. Vivia's hand was operated on and placed in a cast. She spent seven days in the hospital. Since then she has undergone further surgery and hospitalization together with physical therapy. She experiences pain in her injured hand and has limited movement and use of it.

At trial, the evidence concerning general security measures at Truman High School disclosed that in the fall of 1982 there were 13 trained school safety officers assigned to the school. They wore uniforms, carried radios, and operated out of the school's first floor security office. There was also a first floor security desk located by the main entrance to which an officer was assigned at all times. The security officers were assigned throughout the building and were expected to cover the building's exits at dismissal time. According to the school's security plan, two to five officers were assigned to the second floor main entrance at dismissal, although they were not required by the plan to be on the second floor veranda outside. Teachers were also expected to assist in providing security by using their independent judgment with minor matters and seeking the assistance of other personnel with more serious incidents. At trial, the school's security coordinator could not recall how many fights had occurred at the school during the preceding year nor whether security officers were at their posts at dismissal time on the day in question....

Schools are under a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision....Schools are not insurers of safety, however, for they cannot reasonably be expected to continuously supervise and control all movements and activities of students; therefore, schools are not to be held liable "for every thoughtless or careless act by which one pupil may injure another."...The nature of the duty owed was set forth in the seminal case of Hoose v. Drumm...."[A] teacher owes it to his [or her] charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances." The duty owed derives from the simple fact that a school, in assuming physical custody and control over its students, effectively takes the place of parents and guardians....

In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third party acts could reasonably have been anticipated.... Actual or constructive notice to the school of prior similar conduct is generally required because, obviously, school personnel cannot reasonably be expected to guard against all of the sudden, spontaneous acts that take place among students daily; an injury caused by the impulsive, unanticipated act of a fellow student ordinarily will not give rise to a finding of negligence absent proof of prior conduct that would have put a reasonable person on notice to protect against the injury-causing act....

Even if a breach of the duty of supervision is established, the inquiry is not ended; the question arises whether such negligence was the proximate cause of the injuries sustained. In some cases, the wrongful conduct of a fellow pupil may be considered extraordinary and intervening, thus breaking the causal nexus between a defendant's negligent act or omission and a plaintiff's injury. The test to be applied is whether under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the school's negligence....

We agree with the Appellate Division that there was sufficient evidence as a matter of law to establish liability for negligent supervision in this case. Considering the evidence in the light most favorable to plaintiffs, the verdict should stand. Based on Virna's testimony, which the jury was entitled to credit, it was not unreasonable for the jury to infer that defendant Board was on notice of an imminent foreseeable danger to Virna. The violent acts which caused Plaintiffs' injuries were sparked by a prior altercation and death threat of which defendant, through one of its teachers, was expressly made aware; yet no action was taken to prevent escalation of the incident by the teacher who met Virna and was in a position to assist her. Indeed, no security personnel were even present in the main security office or at key locations throughout the school when Virna sought to report the run-in and Webster's threat.

It was not irrational for the jury to conclude on such evidence that defendant Board was on notice of an imminent danger to Virna and did nothing reasonably calculated to protect her from that danger....Nor can it necessarily be said that this case involved the type of unforeseeable, spontaneous acts of violence for which school districts cannot be held liable....

Supervision of students is obviously needed at dismissal time, when the largest number of students congregate and fights are most likely to occur. Indeed, this is reflected in the high school's security plan, which called for two to five security officers to be positioned at the second floor main entrance at dismissal. The uncontradicted testimony revealed that no security officers were present at the second floor main entrance at the time plaintiffs were assaulted. We stress, however, that defendant's failure to comply with the requirements of its security plan was not the only factor establishing negligence.... The jury needed little more than its own common experience to conclude that security or supervisory personnel should have been present at dismissal.

On the issue of proximate cause, we conclude that a rational jury could find that the complete absence of security or supervisory personnel at a time and place when vigilance was absolutely essential constituted the proximate cause of plaintiffs' injuries. Proximate cause is a question of fact for the jury where varying inferences are possible....

In sum, we hold only that it was not irrational for the jury to find as it did on the basis of the evidence presented in this case....

Order affirmed....

DISTRICTS MAY BE REQUIRED BY COURTS TO LEVY PROPERTY TAX ADEQUATE TO FUND DESEGREGATION REMEDIES.

Missouri v. Jenkins
110 SCt 1651 (1990)

Supreme Court of the United States

Justice WHITE delivered the opinion of the Court. The United States District Court for the Western District of Missouri imposed an increase in the property taxes levied by the Kansas City, Missouri, School District (KCMSD) to ensure funding for the desegregation of KCMSD's public schools. We granted certiorari to consider the State of Missouri's argument that the District Court lacked the power to raise local property taxes. For the reasons given below, we hold that the District Court abused its discretion in imposing the tax increase. We also, hold, however, that the modifications of the District Court's order made by the Court of Appeals do satisfy equitable and constitutional principles governing the District Court's power....

...After the lengthy trial, the District Court found that KCMSD and the State had operated a segregated schools system within the KCMSD....

The District Court thereafter issued an order detailing the remedies necessary to eliminate the vestiges of segregation and the financing necessary to implement those remedies....The District Court originally estimated the total cost of the desegregation remedy to be almost $88,000,000 over three years, of which it expected the State to pay $67,592,072 and KCMSD to pay $20,140,472. The court concluded, however, that several provisions of Missouri law would prevent KCMSD from being able to pay its share of the obligation. The Missouri Constitution limits local property taxes to $1.25 per $100 of assessed valuation unless a majority of the voters in the district approve a higher levy, up to $3.25 per $100; the levy may be raised above $3.25 per $100 only if two thirds of the voters agree....The "Hancock Amendment" requires property tax assessed at a higher valuation to ensure that taxes will not be increased solely as a result of reassessment....The Hancock Amendment thus prevents KCMSD from obtaining any revenue increase as a result of increases in the assessed valuation of real property. "Proposition C" allocates one cent of every dollar raised by the state sales tax to a school's trust fund and requires school districts to reduce property taxes by an amount equal to 50% of the previous year's sales tax receipts in the district.... However, the trust fund is allocated according to a formula that does not compensate KCMSD for the amount lost in property tax revenues, and the effect of Proposition C is to divert nearly half of the sales taxes collect in KCMSD to other parts of the State.

The District Court believed that it had the power to order a tax increase to ensure adequate funding of the desegregation plan, but it hesitated to take this step. It chose instead to enjoin the effect of the Proposition C rollback to allow KCMSD to raise an additional $4,000,000 for the coming fiscal year. The court ordered KCMSD to submit to the voters a proposal for an increase in taxes sufficient to pay for its share of the desegregation remedy in following years....

The Court of Appeals for the Eighth Circuit affirmed the District Court's findings of liability and remedial order in most respects....The Court of Appeals agreed with the State, however, that the District Court had failed to explain adequately why it had imposed most of the cost of the desegregation plan on the State....The Eighth Circuit ordered the District Court to divide the cost equally between the State and KCMSD....We denied certiorari....

The District Court next considered, as the Court of Appeals had directed, how to shift the cost of desegregation to KCMSD. The District Court concluded that it would be "clearly inequitable" to require the population of KCMSD to pay half of the desegregation cost, and that "even with Court help it would be very difficult for the KCMSD to fund more than 25% of the costs of the entire remedial plan." The court reasoned that the State should pay for most of the desegregation cost under the principle that "'the person who starts the fire has more responsibility for the damages caused than the person who fails to put it out,'" and that apportionment of damages between the State and KCMSD according to fault was supported by the doctrine of comparative fault in tort, which had been adopted by the Missouri Supreme Court of in Gustafson v. Benda,....The District Court then held that the State and KCMSD were 75% and 25% at fault, respectively, and ordered them to share the cost of the desegregation remedy in that proportion. To ensure complete funding of the remedy, the court also held the two tortfeasors jointly and severally liable for the cost of the plan....

Three months later, the District Court adopted a plan requiring $187,450,344 in further capital improvements....By then it was clear that KCMSD would lack the resources to pay for its 25% share of the desegregation cost. KCMSD requested that the District Court order the State to pay for any amount that KCMSD could not meet. The District Court declined to impose a greater share of the cost on the State, and it accepted that KCMSD had "exhausted all available means of raising additional revenue." Finding itself with "no choice but to exercise its broad equitable powers and enter a judgment that will enable the KCMSD to raise its share of the cost of the plan," and believing that the "United States Supreme Court has stated that a tax may be increased if 'necessary to raise funds adequate to...operate and maintain without racial discrimination a public school system,'"...the court ordered the KCMSD property tax levy raised from $2.05 to $4.00 per $100 of assessed valuation through the 1991-1992 fiscal year....KCMSD was also directed to issue $150,000,000 in capital improvement bonds. A subsequent order directed that the revenues generated by the property tax increase be used to retire the capital improvement bonds....

The State appealed, challenging the scope of the desegregation remedy, the allocation of the cost between the State and KCMSD, and the tax increase....

We turn to the tax increase imposed by the District Court. The State urges us to hold that the tax increase violated Article III, the Tenth Amendment, and principles of federal/state comity. We find it unnecessary to reach the difficult constitutional issues, for we agree with the State that the tax increase contravened the principles of comity that must govern the exercise of the District Court's equitable discretion in this area.

It is accepted by all the parties, as it was by the courts below, that the imposition of a tax increase by a federal court was an extraordinary event. In assuming for itself the fundamental and delicate power of taxation, the District Court not only intruded on local authority but circumvented it altogether....

The District Court believed that it had no alternative to imposing a tax increase. But there was an alternative, the very one outlined by the Court of Appeals; it could have authorized or required KCMSD to levy property taxes at a rate adequate to fund the desegregation remedy and could have enjoined the operation of state laws that would have prevented KCMSD from exercising this power....The difference between the two approaches is far more than a matter of form. Authorizing and directing local government institutions to devise and implement remedies not only protects the function of those institutions but, to the extent possible, also places the responsibilities for solutions to the problems of segregation upon those who have themselves created the problems....

The District Court therefore abused its discretion in imposing the tax itself. The Court of appeals should not have allowed the tax increase to stand and should have reversed the District Court in this respect....

We stand on different ground when we review the modification to the District Court's order made by the Court of Appeals. As explained,...the Court of Appeals held that the District Court in the future should authorize KCMSD to submit a levy to the state tax collection authorities adequate to fund its budget and should enjoin the operation of state laws that would limit or reduce the levy below that amount....

It is true that in Milliken v. Bradley,...we stated that the enforcement of a money judgment against the State did not violate principles of federalism because "[t]he District Court...neither attempted to restructure local governmental entities nor... mandat[ed] a particular method or structure of state or local financing." But we did not there state that a District Court could never set aside state laws preventing local governments from raising funds sufficient to satisfy their constitutional obligations just because those funds could also be obtained from the States. To the contrary, 42 U.S.C section 1983 (1982 ed.), on which respondents' complaint is based, is authority enough to require each tortfeasor to pay its share of the cost of the remedy if it can, and apportionment of the cost is part of the equitable power of the District Court....

We turn to the constitutional issues. The modifications ordered by the Court of Appeals cannot be assailed as invalid under the Tenth Amendment. "The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgment enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment."...

Finally, the State argues that an order to increase taxes cannot be sustained under the judicial power of Article III. Whatever the merits of this argument when applied to the District Court's own order increasing taxes, a point we have not reached,...a court order directing a local government body to levy its own taxes is plainly a judicial act within the power of a federal court....

The State maintains, however,...the federal judicial power can go no further than to require local governments to levy taxes as authorized under state law. In other words, the State argues that federal courts cannot set aside state-imposed limitations on local taxing authority because to do so is to do more than to require the local government "to exercise the power that is theirs." We disagree....

It is therefore clear that a local government with taxing authority may be ordered to levy taxes in excess of the limit set by state statute where there is reason based in the Constitution for not observing the statutory limitation....Here the KCMSD may be ordered to levy taxes despite the statutory limitations on its authority in order to compel the discharge of an obligation imposed on KCMSD by the Fourteenth Amendment. To hold otherwise would fail to take account of the obligations of local governments, under the Supremacy Clause, to fulfill the requirements that the Constitution imposes on them. However wide the discretion of local authorities in fashioning desegregation remedies may be, "if a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." North Carolina State Bd. of Education v. Swann,....Even though a particular remedy may not be required in every case to vindicate constitutional guarantees, where (as here) it has been found that a particular remedy is required, the State cannot hinder the process by preventing a local government from implementing that remedy.

Accordingly, the judgment of the Court of Appeals is affirmed insofar as it required the District Court to modify its funding order and reversed insofar as it allowed the tax increase imposed by the District Court to stand. The case is remanded for further proceedings consistent with this opinion....

A STUDENT MAY BE EXPELLED FROM SCHOOL FOR SELLING MARIJUANA IN SCHOOL.

Morgan v. Girard City School District
630 NE 2d 71 (1993)

Court of Appeals of Ohio, Trumbull County

FORD, Presiding Judge.

Appellant, Jerome Morgan, a minor, by Sherry Morgan, his mother, brings this appeal from the judgment of the Trumbull County Court of Common Pleas in favor of appellee, Board of Education of Girard City School District ("board"). The trial court affirmed the board's decision to expel appellant from Girard High School.

On October 2, 1992, certain members of the Girard High School staff discovered that one of appellant's fellow students, James Stephens, had brought marijuana to school and given it to appellant, who then sold it to another student, Jodi Perez, for $5. This $5 was later recovered by the Assistant Principal, Ronald Ragozine, during the ensuing investigation....[T]here was substantial, reliable evidence that appellant knowingly distributed the marijuana for profit.

Pursuant to the procedures outlined by the school's Discipline Policy and Student Assistance Program ("SAP"),...the Superintendent of Schools, Anthony D'Ambrosio, expelled appellant for eighty days.

Under the Discipline Policy, selling or distributing drugs carries a ten-day suspension with a recommendation to the superintendent for expulsion on the first offense....[T]he Discipline Policy,...prohibits the selling or distributing of drugs for profit, and calls for a ten-day suspension followed by a mandatory eighty-day expulsion.

Stephens and Perez were each suspended for three days....The superintendent based appellant's harsher punishment on the fact that appellant had engaged in the sale or distribution of marijuana for profit, as opposed to possession, use, or giving away the drug, which does not mandate expulsion.

Appellant timely appealed his expulsion to the board, which conducted an administrative hearing, and upheld the expulsion on December 15, 1992....

...[T]he trial court entered final judgment affirming the board's order of expulsion and dissolving the stay. Appellant timely appealed to this court....

...[A]ppellant contends that his rights to due process and equal protection were violated because under the SAP and Discipline Policy, the board was required to treat appellant more harshly than it did Stephens or Perez. Thus, appellant claims that he was "singled out" for more severe punishment while he was no more culpable than the other two....

The order of expulsion in the instant case does not constitute an arbitrary, capricious, or unreasonable action because it was based on appellant's violation of the school's stated policy. Appellant's harsher punishment was a result of the board's determination that selling drugs is a more severe penalty than giving away, possessing, or using drugs. Since we cannot interfere with the board's reasonable exercise of judgment as to which activities should be punished and to what degree, we cannot say that appellant's right to due process has been violated simply because the board adhered to its own regulations.

Similarly, appellant contends that the disparate treatment given him and the other two students should be examined in the context of equal protection. Since appellant has not demonstrated that either a suspect class or fundamental right is involved, we will subject the case to the lowest level of scrutiny, the rational basis test. This test provides that governmental action may classify people in a manner that is rationally related to legitimate governmental objectives....

We have already determined that the board's decision to punish the sale of drugs more harshly than it does the possession or use of them is reasonable and should not be interfered with. Therefore, the board had a rational basis upon which to rely in formulating its anti-drug policy. Based on the foregoing, we conclude that appellant's assignments have no merit, and that the trial court did not err in upholding appellant's expulsion. Accordingly, we affirm.

WHEN A TEACHER SLEEPS WITH ONE OF HIS MALE STUDENTS ON SEVERAL OCCASIONS, THAT TEACHER COMMITS UNPROFESSIONAL CONDUCT, JUSTIFYING HIS DISMISSAL AS A TEACHER.

Morris v. Clarksville-Montgomery
867 SW 2d 324 (1993)

Court of Appeals of Tennessee

TODD, Presiding Judge.

This is judicial review of the action of the captioned School Board in discharging the captioned plaintiff from his position of band instructor....

...Charles Lindsey, Director of the Clarksville-Montgomery County School System, charge[d] James Morris, a tenured teacher assigned to Northeast High School, with the following offenses and recommended that Mr. Morris...be dismissed from his position as a tenured teacher in the Clarksville-Montgomery County School System.

The specific offenses...are:

Conduct unbecoming to a member of the teaching profession in that:

a. he invited and allowed Paul Smith, one of his students to stay overnight in his home on more than one occasion and slept in the same bed with him and had sexual contact with the student and allowed the student to have sexual contact with him, such contact also occurring on more than one occasion.

> b. he invited and allowed other male students to stay overnight at his home and to sleep in the same bed with him, in disregard of the direction of the Principal and Assistant Principal of Northeast High School who had advised him that students should not stay overnight at his home....

Plaintiff admitted that two other students had spent the night in bed with him at his home.

Paul Smith testified that when he spent the night with plaintiff, he (plaintiff) rubbed Smith's back and "privates" on several occasions; after which Smith refused to go to plaintiff's house and that, thereafter, plaintiff became very critical of his band performance and reported him for misbehavior....

Unprofessional conduct means conduct indicating an unfitness to teach....

In the present case, plaintiff has admitted such intimacy with Paul Smith and that thereafter, Smith became a disciplinary problem. Such intimacy is naturally calculated to compromise tutorial authority and this record illustrates its detrimental effect.

A teacher who invites or permits a student or students to sleep with him and engage in intimate activity, compromises his ability to teach.

Based upon the evidence stated, this Court finds the plaintiff guilty of unprofessional conduct and affirms his dismissal....

A BASIC READING SERIES IS NOT UNCONSTITUTIONAL BECAUSE IT CONFLICTS WITH A STUDENT'S RELIGIOUS BELIEFS.

Mozert v. Hawkins County Board of Education
827 F 2d 1058 (1987)

United States Court of Appeals, Sixth Circuit

LIVELY, Chief Judge. This case arose under the Free Exercise Clause of the First Amendment, made applicable to the states by the Fourteenth Amendment. The district court held that a public school requirement that all students in grades one through eight use a prescribed set of reading textbooks violated the constitutional rights of objecting parents and students....

Early in 1983 the Hawkins County Tennessee Board of Education adopted the Holt, Rinehart and Winston basic reading series (the Holt series) for use in grades 1-8 of the public schools of the county....

Like many school systems, Hawkins County schools teach "critical reading" as opposed to reading exercises that teach only word and sound recognition. "Critical reading" requires the development of higher order cognitive skills that enable students to evaluate the material they read, to contrast the ideas presented, and to understand complex characters that appear in reading material....

The plaintiff Vicki Frost is the mother of four children, three of whom were students in Hawkins County public schools in 1983. At the beginning of the 1983-84 school year Mrs. Frost read a story in a daughter's sixth grade reader that involved mental telepathy. Mrs. Frost, who describes herself as a "born again Christian," has a religious objection to any teaching about mental telepathy. Reading further, she found additional themes in the reader to which she had religious objections. After discussing her objections with other parents, Mrs. Frost talked with the principal of Church Hill Middle School and obtained an agreement for an alternative reading program for students whose parents objected to the assigned Holt reader. The students who elected the alternative program left their classrooms during the reading sessions and worked on assignments from an older textbook series in available office or library areas. Other students in two elementary schools were excused from reading the Holt books.

In November 1983 the Hawkins County School Board voted unanimously to eliminate all alternative reading programs and require every student in the public schools to attend classes using the Holt series. Thereafter the plaintiff students refused to read the Holt series or attend reading classes where the series was being used....

On December 2, 1983, the plaintiffs consisting of seven families--14 parents and 17 children--filed this action....In their complaint the plaintiffs asserted that they have sincere religious beliefs which are contrary to the values taught or inculcated by the reading textbooks and that it is a violation of the religious beliefs and convictions of the plaintiff students to be required to read the books and a violation of the religious beliefs of the plaintiff parents to permit their children to read the books. The plaintiffs sought to hold the defendants liable because "forcing the student-plaintiffs to read school books which teach or inculcate values in violation of their religious beliefs and convictions is a clear violation of their rights to the free exercise of religion protected by the First and Fourteenth Amendments to the United States Constitution....

Vicki Frost was the first witness for the plaintiffs, and she presented the most complete explanation of the plaintiffs' position. The plaintiffs do not belong to a single church or denomination, but all consider themselves born-again Christians. Mrs. Frost testified that the word of God as found in the Christian Bible "is the totality of my beliefs. There was evidence that other members of their churches, and even their pastors, do not agree with their position in this case.

Mrs. Frost testified that she had spent more than 200 hours reviewing the Holt series and had found numerous passages that offended her religious beliefs. She stated that the offending materials fell into seventeen categories which she listed. These ranged from such familiar concerns of fundamentalist Christians as evolution and "secular humanism" to less familiar themes such as "futuristic supernaturalism," pacifism, magic and false views of death.

In her lengthy testimony Mrs. Frost identified passages from stories and poems used in the Holt series that fell into each category. Illustrative is her first category, futuristic supernaturalism, which she defined as teaching "Man As God." Passages that she found offensive described Leonardo da Vinci as the human with a creative mind that "came closest to the divine touch."...Mrs. Frost testified that it is an "occult practice" for children to use imagination beyond the limitation of scriptural authority. She testified that the story that alerted her to the problem with the reading series fell into the category of futuristic supernaturalism. Entitled "A Visit to Mars," the story portrays thought transfer and telepathy in such a way that "it could be considered a scientific concept," according to this witness. This theme appears in the testimony of several witnesses, i.e., the materials objected to "could" be interpreted in a manner repugnant to their religious beliefs.

Mrs. Frost described objectionable passages from other categories in much the same way. Describing evolution as a teaching that there is no God, she identified 24 passages that she considered to have evolution as a theme....

Another witness for the plaintiffs was Bob Mozert, father of a middle school and an elementary school student in the Hawkins County system. His testimony echoed that of Vicki Frost in large part, though his answers to questions tended to be much less expansive....

The first question to be decided is whether a governmental requirement that a person be exposed to ideas he or she finds objectionable on religious grounds constitutes a burden on the free exercise of that person's religion as forbidden by the First Amendment....

It is also clear that exposure to objectionable material is what the plaintiffs objected to albeit they emphasize the repeated nature of the exposure. The complaint mentioned only the textbooks that the students were required to read. It did not seek relief from any method of teaching the material and did not mention the teachers' editions. The plaintiffs did not produce a single student or teacher to testify that any student was ever required to affirm his or her belief or disbelief in any idea or practice mentioned in the various stories and passages contained in the Holt series. However, the plaintiffs appeared to assume that materials clearly presented as poetry, fiction and even "make-believe" in the Holt series were presented as facts which the students were required to believe. Nothing in the record supports this assumption....

Vicki Frost testified that an occasional reference to role reversal, pacifism, rebellion against parents, one-world government and other objectionable concepts would be acceptable, but she felt it was the repeated references to such subjects that created the burden....

...Mrs. Frost testified that it would be acceptable for the schools to teach her children about other philosophies and religions, but if the practices of other religions were described in detail, or if the philosophy was "profound" in that it expressed a world view that deeply undermined her religious beliefs, then her children "would have to be instructed to [the] error [of the other philosophy]." It is clear that to the plaintiffs there is but one acceptable view--the Biblical view, as they interpret the Bible. Furthermore, the plaintiffs view very human situation and decision, whether related to personal belief and conduct or to public policy and programs, from a theological or religious perspective....

The Supreme Court has recently affirmed that public schools serve the purpose of teaching fundamental values "essential to a democratic society." These values "include tolerance of divergent political and religious views" while taking into account "consideration of the sensibilities of others."...The Court has noted with apparent approval the view of some educators who see public schools as an "assimilative force" that brings together "diverse and conflicting elements" in our society "on a broad but common ground."...The critical reading approach furthers these goals. Mrs. Frost stated specifically that she objected to stories that develop "a religious tolerance that all religions are merely different roads to God." Stating that the plaintiffs reject this concept, presented as a recipe for an ideal world citizen, Mrs. Frost said, "We cannot be tolerant in that we accept other religious views on an equal basis with ours." While probably not an uncommon view of true believers in any religion, this statement graphically illustrates what is lacking in the plaintiffs' case.

The "tolerance of divergent...religious views" referred to by the Supreme Court is a civil tolerance, not a religious one. It does not require a person to accept any other religion as the equal of the one to which that person adheres. It merely requires a recognition that in a pluralistic society we must "live and let live." If the Hawkins County school had required the plaintiff students either to believe or say they believe that "all religions are merely different roads to God," this would be a different case. No instrument of government can, consistent with the Free Exercise Clause, require such a belief or affirmation....[T]he record in this case discloses an effort by the school board to offer a reading curriculum designed to acquaint students with a multitude of ideas and concepts, though not in proportions the plaintiffs would like. While many of the passages deal with ethical issues, on the surface at least, they appear to us to contain no religious or anti-religious messages. Because the plaintiffs perceive every teaching that goes beyond the "three Rs" as inculcating religious ideas, they admit that any value-laden reading curriculum that did not affirm the truth of their beliefs would offend their religious convictions....The only conduct compelled by the defendants was reading and discussing the material in the Holt series, and hearing other students' interpretations of those materials. This is the exposure to which the plaintiffs objected. What is absent from this case is the critical element of compulsion to affirm or deny a religious belief or to engage or refrain from engaging in a practice forbidden or required in the exercise of a plaintiff's religion....

...There was no evidence that the conduct required of the students was forbidden by their religion. Rather, the witnesses testified that reading the Holt series "could" or "might" lead the students to come to conclusions that were contrary to teachings of their and their parents' religious beliefs. This is not sufficient to establish an unconstitutional burden....

The judgment of the district court granting injunctive relief and damages is reversed....

ACHIEVEMENT TESTS MAY BE USED BY SCHOOLS TO MONITOR HOME INSTRUCTION.

Murphy v. State of Arkansas
852 F 2d 1039 (1988)

United States Court of Appeals, Eighth Circuit

HEANEY, Circuit Judge. Appellants challenge the decision of the district court upholding the constitutionality of the Arkansas Home School Act....We affirm the decision of the district court.

Doty and Phyllis Murphy are evangelical Christians who believe that "Christian Scriptures require parents to take personal responsibility for every aspect of their children's training and education." They have six children, ages four through eighteen. The Murphys educate their children at home, providing an "education that is pervasively religious in nature and which does not conflict with the religious beliefs they hold, based upon their understanding of the scriptures."

Under Arkansas law, a parent must educate her children through the age of sixteen. This requirement may be satisfied by sending the child to public, private, or parochial school or by educating the child at home. The Arkansas Home School Act...requires parents intending to school their children at home to notify in writing the superintendent of their local school district prior to the commencement of each school year. The notice must provide information concerning the name, age, and grade of each student, the core curriculum to be offered, the schedule of instruction and the qualifications of the person teaching. The parent must also agree to submit the children to standardized achievement tests each year and, when the children reach the age of fourteen, to a minimum performance test. All of these tests are administered, interpreted, and acted upon by the Arkansas Department of Education. Finally, the parent must provide any information to the superintendent which might indicate the need for special educational services for the children.

The achievement test administered to a student schooled at home is chosen by the parent from a list of nationally recognized tests provided by the director of the State Department of Education or the director's designee. The parent may be present when the standardized test is administered, but both parent and student are under the supervision of a test administrator. The results of the standardized tests are used for several purposes. Most significantly, if a home school student does not achieve a composite score within eight months of grade level in designated subjects, the student must be placed in a public, private, or parochial school. No such annual testing is required for students in public, private, or parochial schools. If children not schooled at home are, for some reason, tested, no remedial placement is required for those who do not achieve certain scores.

The Murphys allege that the Arkansas statutory scheme deprives them of the right to free exercise of religion, the right of due process of law, the right of equal protection of the laws, and the right of privacy and parental liberty in violation of the United States Constitution. The Murphys brought an action for a declaratory judgment in federal district court. That court awarded judgment to the state.

The Free Exercise Clause

The Murphys assert that [the Arkansas code]...requiring that a standardized test be given to their children under the supervision of a test administrator deprives them of the right to free exercise of religion as guaranteed by the first amendment. They argue that the irreligious beliefs require they must be completely responsible for every aspect of their children's education. In contrast, the Arkansas Home School Act places responsibility for testing and interpreting test results with the State of Arkansas, rather than with the parents.

To determine whether governmental conduct infringes upon an individual's first amendment free exercise rights, a court must first inquire whether the challenged governmental action interferes with the claimant's "sincerely held religious beliefs." Second, if such as a belief is interfered with, the court must determine whether the governmental action is the least restrictive means of achieving some compelling governmental interest....

In the case before us, the parties have stipulated that the testing requirements of the Arkansas law interfere with the Murphys' sincerely held religious beliefs. Thus, we will go no further in examining the subtleties of the Murphys' beliefs. Consequently, the resolution of the free exercise claim involves answering two related questions; First, does the state have a compelling interest in the education of all children? Second, if so, is the Arkansas statutory scheme the least restrictive means of achieving that objective? We believe that the answer to both of these questions is yes.

The government has a compelling interest in educating all of its citizens. Education of the citizenry is and always has been a preeminent goal of American society. Reaching back through the collective memory of the Republic, the fundamental importance of education in the design of our system of government rapidly becomes clear. Article III of the Northwest Ordinance states in part: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." In Yoder, the Supreme

Court adopted Thomas Jefferson's often expressed belief that education was a "bulwark" against tyranny....

> Thomas Jefferson pointed out early in our history, that some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence. Further, education prepares individuals to be self-reliant and self-sufficient participants in society....

The fundamental importance of education in terms of access and achievement in American society was further underscored by the Court in Brown v. Board of Education....

It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education....

Thus, as the district court correctly noted, it is "settled beyond dispute, as a legal matter, that the state has a compelling interest in ensuring that all its citizens are being adequately educated."

Given the existence of a compelling governmental interest, we must next inquire whether Arkansas' home testing system is the least restrictive means to achieve that purpose. In doing so, we recognize that the state must have a mechanism by which it can confidently and objectively be assured that its citizens are being adequately educated.

Upon examination it would appear that Arkansas has created the least restrictive system possible to assure its goal. By providing the option of home schooling, Arkansas allows parents vast responsibility and accountability in terms of their children's education--control far in excess of limitations on religious rights that have been previously upheld....Arkansas requires neither that the parent instructing the home-schooled child be a certified teacher nor that the parent follow a mandated curriculum. The state's only safeguard to ensure adequate training of the home-schooled student is the standardized achievement test. Even regarding this test, the state allows wide latitude to the parents. The parent may chose a test administered from a list of nationally recognized standard achievement tests and may be present while the test is administered.

Finally, the Murphys make no showing, as made by the Amish in Yoder, that the state can be assured its interest will be attained if appellants' religious beliefs are accommodated. We reject the

Murphys' argument that parent "testing" of children provides a sufficient safeguard to assure the state's interest in education is protected. Likewise, parental affidavits concerning the children's progress would also be insufficient. In the end, we believe that the state has no means less restrictive than its administration of achievement tests to ensure that its citizens are being properly educated.

Equal Protection

The Murphys argue that the Arkansas Home School Act violates the equal protection clause of the fourteenth amendment. Specifically, they claim that those who school their children at home for religious reasons are a suspect class or that parental control over a child's education involves a fundamental right....Thus, the Murphys contend that the state appears irrationally to allow parents to eduction their children in religious private schools without any state regulatory supervision but subjects children schooled at home to the various requirements of the Home School Act....

It could be argued that the statute, while superficially neutral, has a discriminatory impact on the category of deeply religious individuals impelled by their convictions to school their children at home. Yet, even if such discriminatory impact were shown--which it has not been--this would not be sufficient to invoke strict scrutiny. The Murphys would still bear the burden of proving discriminatory purpose or intent....Because no such showing of either discriminatory impact or discriminatory intent has been made, strict scrutiny analysis is inappropriate here.

Second, we find no persuasive arguments advanced that there is a fundamental right of parents to supervise their children's education to the extent that the Murphys contend. The recognition of such a right would fly directly in the face of those cases in which the Supreme Court has recognized the broad power of the state to compel school attendance and regulate curriculum and teacher certification....Thus, again, strict scrutiny cannot be invoked in this case.

Given that strict scrutiny analysis does not apply, we move to the question of whether Arkansas has a rational reason to subject home schooling to regulatory requirements, while at the same time freeing private schools from virtually any regulation. This step by the legislature in Arkansas may at first glance offend common sense, and, sitting as a legislature, we might not have made this same decision. However, our job is not to sit as a legislature....

First, it could be argued that the notion of an actual independent school, away from home, implies more formality and structure than a home school. This could lead the state to believe that more serious instruction would be occurring there than in the relaxed atmosphere of a child and parents in their own home. Second, the notion that more than one family is likely to be sending their children to the private school may provide an additional objective indication of the private school's quality that is not present in the context of individual home schools. Finally, unlike a home-school, parents sending a child to a private school have to pay money for education, and, hence, would be more likely to demand their money's worth of instructional quality from the private school. All these possibilities together could provide Arkansas with a passable reason for the challenged distinction under the minimum rationality standards of the equal protection clause.

Right of Privacy

The Murphys argue that the right of privacy should be extended to protect parental decisions concerning the direction of a child's education from state interference....

> The Court has repeatedly stressed that while parents have a constitutional right to send their children to private schools and a constitutional right to select private schools that offer specialized instruction, they have no constitutional right to provide their children with private school education unfettered by reasonable government regulation....Indeed, the Court in Pierce expressly acknowledged "the power of the State reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils."...

The Supreme Court has spoken clearly on this issue, and we are bound by its decision. Moreover, we agree with the Court's reasoning and its conclusion. We thus decline to extend the right of privacy to this situation.

For the foregoing reasons, the decision of the district court is affirmed.

A TUBERCULAR TEACHER IS HANDICAPPED UNDER SECTION 504 OF THE REHABILITATION ACT.

School Board of Nassau County, Florida v. Arline
107 SCt 1123 (1987)

Supreme Court of the United States

Justice BRENNAN delivered the opinion of the Court. Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended, 29 U.S.C. section 794 (Act), prohibits a federally funded state program from discriminating against a handicapped individual solely by reason of his or her handicap. This case presents the questions whether a person afflicted with tuberculosis, a contagious disease, may be considered a "handicapped individual" within the meaning of section 504 of the Act, and, if so, whether such an individual is "otherwise qualified" to teach elementary school.

From 1966 until 1979, respondent Gene Arline taught elementary school in Nassau County, Florida. She was discharged in 1979 after suffering a third relapse of tuberculosis within two years. After she was denied relief in state administrative proceedings, she brought suit in federal court, alleging that the School Board's decision to dismiss her because of her tuberculosis violated section 504 of the Act.

The trial was held in District Court....According to the medical records reviewed by Dr. McEuen, Arline was hospitalized for tuberculosis in 1957....For the next twenty years, Arline's disease was in remission....Then, in 1977, a culture revealed that tuberculosis was again active in her system; cultures taken in March 1978 and in November 1978 were also positive....

The superintendent of schools for Nassau County, Craig Marsh, then testified as to the School Board's response to Arline's medical reports. After both her second relapse, in the spring of 1978, and her third relapse in November 1978, the School Board suspended Arline with pay for the remainder of the school year....At the end of the 1978-1979 school year, the School Board held a hearing, after which it discharged Arline, "not because she had done anything wrong," but because of the "continued reoccurrence of tuberculosis."...

In her trial memorandum, Arline argued that it was "not disputed that [she was dismissed] solely on the basis of her illness. Since the illness in this case qualifies the Plaintiff as a 'handicapped person' it is clear that she was dismissed solely as a result of her handicap in violation of Section 504."...The District Court held, however, that although there was "[n]o question that she suffers a handicap," Arline was nevertheless not "a handicapped person under the terms of that statute."...The court found it "difficult...to conceive that Congress intended contagious diseases to be included within the definition of a handicapped person." The court then went on to state that, "even assuming" that a person with a contagious disease could be deemed a handicapped person, Arline was not "qualified" to teach elementary school....

The Court of Appeals reversed, holding that "persons with contagious diseases are within the coverage of section 504," and that Arline's condition "falls...neatly within the statutory and regulatory framework" of the Act....

...Section 504 of the Rehabilitation Act reads in pertinent part:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance....

In 1974 Congress expanded the definition of "handicapped individual" for use in section 504 to read as follows:

> [A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment....

...[T]he regulations promulgated by the Department of Health and Human Services...are particularly significant here because they define two critical terms used in the statutory definition of handicapped individual. "Physical impairment" is defined as follows:

> [A]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems:...respiratory....

In addition, the regulations define "major life activities" as

> functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working....

Within this statutory and regulatory framework, then, we must consider whether Arline can be considered a handicapped individual. According to the testimony of Dr. McEuen, Arline suffered tuberculosis "in an acute form in such a degree that it affected her respiratory system," and was hospitalized for this condition....Arline thus had a physical impairment as that term is defined by the regulations....The impairment was serious enough to require hospitalization, a fact more than sufficient to establish that one or more of her major life activities were substantially limited by her impairment....Petitioners maintain, however, Arline's record of impairment is irrelevant in this case, since the School Board dismissed Arline not because of her diminished physical capabilities, but because of the threat that her relapses of tuberculosis posed to the health of others....

...The fact that some persons who have contagious diseases may pose a serious health threat to others under certain circumstances does not justify excluding from the coverage of the Act all persons with actual or perceived contagious diseases. Such exclusion would mean that those accused of being contagious would never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they were "otherwise qualified." Rather, they would be vulnerable to discrimination on the basis of mythology--precisely the type of injury Congress sought to prevent. We conclude that the fact that a person with a record of physical impairment is also contagious does not suffice to remove that person from coverage under section 504,.

The remaining question is whether Arline is otherwise qualified for the job of elementary school teacher....

We hold that a person suffering from the contagious disease of tuberculosis can be a handicapped person within the meaning of the section 504 of the Rehabilitation Act of 1973, and that respondent Arline is such a person. We remand the case to the District Court to determine whether Arline is otherwise qualified for her position. The judgment of the Court of Appeals is

Affirmed.

A SCHOOL OFFICIALS' SEARCH OF A STUDENT IS CONSTITUTIONAL IF THE SEARCH IS BASED ON REASONABLE SUSPICION, IS JUSTIFIED AT ITS INCEPTION, AND IS REASONABLE IN ITS SCOPE.

New Jersey v. T.L.O.
105 SCt 733 (1985)

Supreme Court of the United States

JUSTICE WHITE delivered the opinion of the Court.

...Our consideration of the proper application of the Fourth Amendment of the public schools...has led us to conclude that the search that gave rise to the case now before us did not violate the Fourth Amendment. Accordingly, we here address only the questions of the proper standard for assessing for legality of searches conducted by public school officials and the application of that standard to the facts of this case.

On March 7, 1980, a teacher at Piscataway High School in Middlesex County, N.J., discovered two girls smoking in a lavatory. One of the two girls was the respondent T.L.O., who at that time was a 14-year-old high school freshman. Because smoking in the lavatory was a violation of a school rule, the teacher took the two girls to the Principal's office, where they met with Assistant Vice Principal Theodore Choplick. In response to questioning by Mr. Choplick, T.L.O.'s companion admitted that she had violated the rule. T.L.O., however, denied that she had been smoking in the lavatory and claimed that she did not smoke at all.

Mr. Choplick asked T.L.O. to come into his private office and demanded to see her purse. Opening the purse, he found a pack of cigarettes, which he removed from the purse and held before T.L.O. as he accused her of having lied to him. As he reached into the purse for the cigarettes, Mr. Choplick also noticed a package of cigarette rolling papers. In his experience, possession of rolling papers by high school students was closely associated with the use of marihuana. Suspecting that a closer examination of the purse might yield further evidence of drug use, Mr. Choplick proceeded to search the purse thoroughly. The search revealed a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing.

Mr. Choplick notified T.L.O.'s mother and the police, and turned the evidence of drug dealing over to the police. At the request of the police, T.L.O's mother took her daughter to police headquarters, where T.L.O. confessed that she had been selling marihuana at the high school. On the basis of the confession and the evidence seized by Mr. Choplick, the State brought delinquency charges against T.L.O. in the Juvenile and Domestic Relations Court of Middlesex County. Contending that Mr. Choplick's search of her purse violated the Fourth Amendment, T.L.O. moved to suppress the evidence found in her purse as well as her confession, which, she argued, was tainted by the allegedly unlawful search....

In determining whether the search at issue in this case violated the Fourth Amendment, we are faced initially with the question whether that Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school official. We hold that it does.

It is now beyond dispute that "the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers." Equally indisputable is the proposition that the Fourteenth Amendment protects the rights of students against encroachment by public school officials....

To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order....

In short, school children may find it necessary to carry with them a variety of legitimate noncontraband items, and there is no reason to conclude that they have necessarily waived all right to privacy in such items merely by bringing them onto school grounds.

Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy;, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems....Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.

How, then, should we strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place? It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools....[W]e hold today that school officials need not obtain a warrant before searching a student who is under their authority.

The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search. Ordinarily, a search--even one that may permissibly be carried out without a warrant--must be based upon "probable cause" to believe that a violation of the law has occurred. However, "probable cause" is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable....

We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the...action was justified at its inception"; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place." Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

There remains the question of the legality of the search in this case....Our review of the facts surrounding the search leads us to conclude that the search was in no sense unreasonable for Fourth Amendment purposes.

The incident that gave rise to this case actually involved two separate searches, with the first--the search for cigarettes--providing the suspicion that gave rise to the second--the search for marihuana. Although it is the fruits of the second search that are at issue here, the validity of the search for marihuana must depend on the reasonableness of the initial search for cigarettes, as there would have been no reason to suspect that T.L.O. possessed marihuana had the first search not taken place. Accordingly, it is to the search for cigarettes that we first turn our attention....

T.L.O. had been accused of smoking, and had denied the accusation in the strongest possible terms when she stated that she did not smoke at all. Surely it cannot be said that under these circumstances, T.L.O.'s possession of cigarettes would be irrelevant to the charges against her or to her response to those charges. T.L.O.'s possession of cigarettes, once it was discovered, would both corroborate the report that she had been smoking and undermine the credibility of her defence to the charge of smoking. To be sure, the discovery of the cigarettes would not prove that T.L.O. had been smoking in the lavatory; nor would it, strictly speaking, necessarily be inconsistent with her claim that she did not smoke at all. But it is universally recognized that evidence, to be relevant to an inquire, need not conclusively prove the ultimate fact in issue, but only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The relevance of T.L.O.'s possession of cigarettes to the question whether she had been smoking and to the credibility of her denial that she smoked supplied the necessary "nexus" between the item searched for and the infraction under investigation....

Our conclusion that Mr. Choplick's decision to open T.L.O.'s purse was reasonable brings us to the question of the further search for marihuana once the pack of cigarettes was located. The suspicion upon which the search for marihuana was founded was provided when Mr. Choplick observed a package of rolling papers in the purse as he removed the pact of cigarettes. Although T.L.O. does not dispute the reasonableness of Mr. Choplick 's belief that the rolling papers indicated the presence of marihuana, she does contend that the scope of the search Mr. Choplick conducted exceeded permissible bounds when he seized and read certain letters that implicated T.L.O. in drug dealing. This argument, too, is unpersuasive. The discover of the rolling papers concededly gave rise to the reasonable suspicion that T.L.O. was carrying marihuana as well as cigarettes in her purse. This suspicion justified further exploration of T.L.O.'s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags of the type commonly used to store marihuana, a small quantity of marihuana, and a fairly substantial amount of money. Under these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of "people who owe me money" as well as to letters, the inference that T.L.O. was involved in marihuana trafficking was substantial enough to justify Mr. Choplick in examining the letters to determine whether they contained any further evidence. In short, we cannot conclude that the search for marihuana was unreasonable in any respect.

Because the search resulting in the discovery of the evidence of marihuana dealing by T.L.O. was reasonable, the New Jersey Supreme Court's decision to exclude that evidence from T.L.O.'s juvenile delinquency proceedings on Fourth Amendment grounds was erroneous. Accordingly, the judgment of the Supreme Court of New Jersey is

Reversed.

FEDERAL COURTS' CONTROL OF A DE JURE SEGREGATED SCHOOL DISTRICT IS LIMITED TO TIME NECESSARY TO REMEDY DISCRIMINATION.

Board of Education of Oklahoma City Public Schools,
Ind. School District, No. 89, v. Dowell
111 SCt 630 (1991)

Supreme Court of the United States

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court....

This school desegregation litigation began almost 30 years ago. In 1961, respondents, black students and their parents, sued petitioners, the Board of Education of Oklahoma City (Board), to end de jure segregation in the public schools. In 1963, the District Court found that Oklahoma City had intentionally segregated both schools and housing in the past, and that Oklahoma City was operating a "dual" school system--one that was intentionally segregated by race....In 1965, the District Court found that the School Board's attempt to desegregate by using neighborhood zoning failed to remedy past segregation because residential segregation resulted in one race schools....Residential segregation had once been state imposed, and it lingered due to discrimination by some realtors and financial institutions. The District Court found that school segregation had caused some housing segregation....In 1972, finding that previous efforts had not been successful at eliminating state imposed segregation, the District Court ordered the Board to adopt the "Finger Plan"...under which kindergartners would be assigned to neighborhood schools unless their parents opted otherwise; children in grades 1-4 would attend formerly all white schools, and thus black children would be bused to those schools; children in grade five would attend formerly all black schools, and thus white children would be bused to those schools; students in the upper grades would be bused to various areas in order to maintain integrated schools; and in integrated neighborhoods there would be standalone schools for all grades.

In 1977, after complying with the desegregation decree for five years, the Board made a "Motion to Close Case." The District Court held in its "Order Terminating Case":

> The Court has concluded that [the Finger Plan] worked and that substantial compliance with the constitutional requirements has been achieved. The School Board, under the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the

> unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before this court....
>
> The School Board, as now constituted, has manifested the desire and intent to follow the law. The court believes that the present members and their successors on the Board will now and in the future continue to follow the constitutional desegregation requirements.
>
> Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court....
>
> This unpublished order was not appealed.

In 1984, the School Board faced demographic changes that led to greater burdens on young black children. As more and more neighborhoods became integrated, more standalone schools were established, and young black students had to be bused further from their inner-city homes to outlying white areas. In an effort to alleviate this burden and to increase parent involvement, the Board adopted the Student Reassignment Plan (SRP), which relied on neighborhood assignments for students in grades K-4 beginning in 1985-1986 school year. Any student could transfer from a school where he or she was in the majority to a school where he or she would be in the minority. Faculty and staff integration was retained, and an "equity officer" was appointed.

In 1985, respondents filed a "Motion to Reopen the Case," contending that the School District had not achieved "unitary" status and that the SRP was a return to segregation. Under the SRP, 11 of 64 elementary schools would be greater than 90% white plus other minorities, and 31 would be racially mixed. The District Court refused to reopen the case, holding that its 1977 finding of unitariness was res judicata as to those who were then parties to the action, and that the district remained unitary.... The District Court found that the School Board, administration, faculty, support staff, and student body were integrated, and transportation, extracurricular activities and facilities within the district were equal and nondiscriminatory. Because unitariness had been achieved, the District Court concluded that court ordered desegregation must end.

The Court of Appeals for the Tenth Circuit reversed....It held that, while the 1977 order finding the district unitary was binding on the parties, nothing in that order indicated that the 1972 injunction itself was terminated. The court reasoned that the finding that the system was unitary merely ended the District

Court's active supervision of the case, and because the school district was still subject to the desegregation decree, respondents could challenge the SRP. The case was remanded to determine whether the decree should be lifted or modified.

On remand, the District Court found that demographic changes made the Finger Plan unworkable, that the Board had done nothing for 25 years to promote residential segregation, and that the school district had bused students for more than a decade in good faith compliance with the court's orders....The District Court found that present residential segregation was the result of private decision-making and economics, and that it was too attenuated to be a vestige of former school segregation. It also found that the district had maintained its unitary status, and that the neighborhood assignment plan was not designed with discriminatory intent. The court concluded that the previous injunctive decree should be vacated and the school district returned to local control....

The Court of Appeals again reversed...holding that "an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate."...That court approached the case "not so much as one dealing with desegregation, but as one dealing with the proper application of the federal law on injunctive remedies."...Relying on United States v. Swift & Co.,...it held that a desegregation decree remains in effect until a school district can show "grievous wrong evoked by new and unforseen conditions"...and "dramatic changes in conditions unforseen at the time of the decree that...impose extreme and unexpectedly oppressive hardship on the obligor."...The Court of Appeals held that, despite the unitary finding, the Board had the "affirmative duty...not to take any action that would impede the process of disestablishing the dual system and its efforts."...

The lower courts have been inconsistent in their use of the term "unitary." Some have used it to identify a school district that has completely remedied all vestiges of past discrimination.... Under that interpretation of the word, a unitary school district is one that has met the mandate of Brown v. Board of Education,...and Green v. New Kent County School Board,....Other courts, however, have used "unitary" to describe any school district that has currently desegregated student assignment, whether or not that status is solely the result of a courtimposed desegregation plan....In other words, such a school district could be called unitary and nevertheless still contain vestiges of past discrimination. That there is such confusion is evident in Georgia State Conference of Branches of NAACP v. Georgia,...where the Court of Appeals drew a distinction between a "unitary school district" and a district that has achieved "unitary status." The court explained that a school district that has not operated segregated schools as proscribed by Green and Swann..."for a period of several years" is unitary, but that a school district cannot be said to have achieved "unitary status" unless it "has eliminated the vestiges of its prior discrimination and has been adjudicated as such through the proper judicial procedures."...

We think it is a mistake to treat words such as "dual" and "unitary" as if they were actually found in the Constitution. The constitutional command of the Fourteenth Amendment is that "[n]o State shall...deny to any person...the equal protection of the laws." Courts have used the terms "dual" to denote a school system which has engaged in intentional segregation of students by race, and "unitary" to describe a school system which has been brought into compliance with the command of the Constitutional. We are not sure how useful it is to define these terms more precisely, or to create subclasses within them. But there is no doubt that the differences in usage described above do exist. The District Court's 1977 order is unclear with respect to what it meant by unitary and the necessary result of that finding. We therefore decline to overturn the conclusion of the Court of Appeals that while the 1977 order of the District Court did bind the parties as to the unitary character of the district, it did not finally terminate the Oklahoma City school litigation. In Pasadena City Bd. of Education v. Spangler,...we held that a school board is entitled to a rather precise statement of its obligations under a desegregation decree. If such a decree is to be terminated or dissolved, respondents as well as the school board are entitled to a like statement from the court.

The Court of Appeals relied upon language from this Court's decision in United States v. Swift and Co.,...for the proposition that a desegregation decree could not be lifted or modified absent a showing of "grievous wrong evoked by new and unforeseen conditions."...It also held that "compliance alone cannot become the basis for modifying or dissolving an injunction,"...relying on United States v. W.T. Grant Co.,....We hold that its reliance was mistaken.

In Swift, several large meat packing companies entered into a consent decree whereby they agreed to refrain forever from entering into the grocery business. The decree was by its terms effective in perpetuity. The defendant meat packers and their allies had over a period of a decade attempted, often with success in the lower courts, to frustrate operation of the decree. It was in this context that the language relied upon by the Court of Appeals in this case was used.

United States v. United Shoe Machinery Corp.,...explained that the language used in Swift must be read in the context of the continuing danger of unlawful restraints on trade which the Court had found still existed...."Swift teaches...a decree may be changed upon an appropriate showing, and it holds that it may not be changed...if the purposes of the litigation as incorporated in the decree...have not been fully achieved."...In the present case, a finding by the District Court that the Oklahoma City School District was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the school board would return to its former ways, would be a finding that the purposes of the desegregation litigation had been fully achieved. No additional showing of "grievous wrong evoked by new and unforeseen conditions" is required of the school board....

From the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination. Brown considered the "complexities arising from the transition to a system of public education free of racial discrimination" in holding that the implementation of desegregation was to proceed "with all deliberate speed."...Green also spoke of the "transition to a unitary, nonracial system of public education."...

Considerations based on the allocation of powers within our federal system, we think, support our view that quoted language from Swift does not provide the proper standard to apply to injunctions entered in school desegregation cases. Such decrees, unlike the one in Swift, are not intended to operate in perpetuity. Local control over the education of children allows citizens to participate in decision-making, and allows innovation so that school programs can fit local needs....The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities. Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination."...

A district court need not accept at face value the profession of a school board which has intentionally discriminated that it will cease to do so in the future. But in deciding whether to modify or dissolve a desegregation decree, a school board's compliance with previous court orders is obviously relevant. In this case the original finding of de jure segregation was entered in 1961, the injunctive decree from which the Board seeks relief was entered in 1972, and the Board complied with the decree in good faith until 1985. Not only do the personnel of school boards change over time, but the same passage of time enables the District Court to observe the good faith of the school board in complying with the decree. The test espoused by the Court of Appeals would condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future. Neither the principles governing the entry and dissolution of injunctive decrees, nor the commands of the Equal

Protection Clause of the Fourteenth Amendment, require any such Draconian result....

In considering whether the vestiges of de jure segregation had been eliminated as far as practicable, the District Court should look not only at student assignments, but "to every facet of school operations, faculty, staff, transportation, extracurricular activities and facilities."...

After the District Court decides whether the Board was entitled to have the decree terminated, it should proceed to decide respondent's challenge to the SRP. A school district which has been released from an injunction imposing a desegregation plan no longer requires court authorization for the promulgation of policies and rules regulating matters such as assignment of students and the like, but it of course remains subject to the mandate of the Equal Protection Clause of the Fourteenth Amendment. If the Board was entitled to have the decree terminated as of 1985, the District Court should then evaluate the Board's decision to implement the SRP under appropriate equal protection principles....

The judgment of Court of Appeals is reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion....

A TEACHER HAS NO CONSTITUTIONAL RIGHT TO TEACH CREATIONISM OR TO DISCUSS HIS RELIGION WITH STUDENTS.

Peloza v. Capistrano Unified School District
37 F 3d 517 (1994)

United States Court of Appeals, Ninth Circuit

PER CURIAM:

John E. Peloza is a high school biology teacher. He sued the Capistrano Unified School District and various individuals connected with the school district under 42 U.S.C. section 1983. He alleges in his complaint that the school district requires him to teach "evolutionism" and that evolutionism is a religious belief system. He alleges this requirement violates his rights under the (1) Free Speech Clause of the First Amendment; (2) Establishment Clause of the First Amendment; (3) Due Process Clause of the Fourteenth Amendment; and (4) Equal Protection Clause of the Fourteenth Amendment....

...According to Peloza's complaint, all persons must adhere to one of two religious belief systems concerning "the origins of life and of the universe:" evolutionism, or creationism....Thus, the school district, in teaching evolutionism, is establishing a state-supported "religion."

We reject this claim because neither the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are "religions" for Establishment Clause purposes. Indeed, both the dictionary definition of religion and the clear weight of the case-law are to the contrary. The Supreme Court has held unequivocally that while the belief in a divine creator of the universe is a religious belief, the scientific theory that higher forms of life evolved from lower forms is not. Edwards v. Aguillard....

...Nowhere does Peloza point to anything that conceivably suggests that the school district accepts anything other than the common definition of "evolution" and "evolutionism." It simply required him as a biology teacher in the public schools of California to teach "evolution." Peloza nowhere says it required more.

The district court dismissed his claim, stating:

> Since the evolutionist theory is not a religion, to require an instructor to teach this theory is not a violation of the Establishment Clause....

...We agree.

Peloza alleges the school district ordered him to refrain from discussing his religious beliefs with students during "instructional time," and to tell any students who attempted to initiate such conversations with him to consult their parents or clergy. He claims the school district, in the following official reprimand, defined "instructional time" as any time the students are on campus, including lunch break and the time before, between, and after classes:

> You are hereby directed to refrain from any attempt to convert student to Christianity or initiating conversations about your religious beliefs during instructional time, which the District believes includes any time students are required to be on campus as well as the time students immediately arrive for the purposes of attending school for instruction, lunch time, and the time immediately prior to students' departure after the instructional day....

While at the high school, whether he is in the classroom or outside of it during contract time, Peloza is not just any ordinary citizen. He is a teacher. He is one of those especially respected persons chosen to teach in the high school's classroom. He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial. To permit him to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause of the First Amendment. Such speech would not have a secular purpose, would have the primary effect of advancing religion, and would entangle the school with religion. In sum, it would flunk all three parts of the test articulated in Lemon v. Kurtzman....

The district court correctly dismissed Peloza's section 1983 claim based on allegations of a violation of his constitutional rights under the Establishment Clause and his rights to free speech and due process....

WITHOUT PROOF OF DISCRIMINATION, A WHITE PRINCIPAL CAN NOT PREVAIL AGAINST BLACK COUNCIL MEMBERS WHO VOTE FOR HIS TERMINATION AS A PRINCIPAL.

Pilditch v. Board of Eduction of City of Chicago
3 F 3d 1113 (1993)

United States Court of Appeals, Seventh Circuit

CUMMINGS, Circuit Judge.

In the effort to give parents and local citizens more control over the public school system, the Illinois Legislature in 1989 passed an education reform measure that created local councils in each school district and invested them with the power to hire and fire principals....Principals accustomed to job security were stripped of tenure and made to serve under four-year renewable contracts. One casualty of the new system, Walter E. Pilditch, brought this reverse discrimination suit claiming that the only reason he has fired from his position as principal of Morgan Park High School in Chicago was his race; Pilditch is white. He sued five of the ten elected members of the local school council, all minorities, who did not vote to renew his contract when it expired on June 30, 1990....

We agree with the district court that Pilditch was able to establish a prima facie case of reverse discrimination. Under McDonnell Douglas, a prima facie case is made out by showing that the plaintiff is a member of a racial minority group, that he applied for and was qualified for a job for which the employer was seeking applicants, that he was rejected, and that afterward the position remained open to others with the complainant's qualifications....Pilditch of course is not a member of a racial minority--this case involves alleged discrimination against a white by blacks. But the prima facie elements were never meant to be applied rigidly....The most likely adaptation of the prima facie case to these unique circumstances, where Pilditch was both fired and then not hired for the vacant position he used to hold, would have him prove that he was meeting the employer's legitimate expectations, was adequately qualified for the job, was fired or not hired, and the employer found a replacement of a different race....

Pilditch was fired and then not hired for his old position; he was certainly qualified for the job he held for six years--the state certified him, as well as his two main competitors, as such; and his replacement was black. The only tricky element is whether Pilditch was meeting his employer's legitimate expectations....

The focus thus shifts to the defendants to offer a nondiscriminatory reason for their actions....Here the defendants cited a number of reasons, any of which would have been sufficient to negate the prima facie showing....Defendants also testified that Pilditch had allowed unsafe conditions to prevail in a laboratory, that he responded inadequately when a white teacher made a racial slur, and that he did not work well with departments in the school. One defendant testified that after six years it was simply time for a change in leadership and that the system needed to be shaken up. Still another testified that the initial note not to renew Pilditch's contract was preliminary in the sense that he could still be rehired, but by firing him the council seized an invaluable opportunity to give other candidates serious consideration as well.

...[T]he plaintiff is left to unmask, if he can, the reasons proffered by the employer as fake. Beyond this, he must also prove that the true reason for his firing was discriminatory.... This is where Pilditch fails; our review of the record suggests a singular lack of evidence to support the conclusion drawn by the judge and jury that Pilditch was fired and not rehired because he is white. As noted, the plaintiff always bears the ultimate burden of persuasion that he was the target of illegal discrimination....In sum, here is the evidence that Pilditch put forth to prove the discriminatory intent of the local council members who voted against him....

...Willa Robinson let out a "whoop" and said, "We did it, girl" as she entered the women's bathroom five to ten minutes after the vote. One witness testified that "as the door closed, there was all kinds of ruckus, laughter, and silliness."...Like Calvin Pearce's smile during the voting, Robinson's statement may suggest that she was elated by the fact of Pilditch's ouster, but it does not convey any reliable information about why she voted the way she did. A joyful whoop at the firing of a principal suggests dislike of the principal, it is true, but all dislike is not based on race.

Recall that the local council system was part of an educational reform package designed to give parents and community members more control over the schools. By putting the power to hire and fire principals in the hands of non-professionals, the Legislature must have realized that local councils would make changes for changes' sake as a way of exerting their newfound authority, even if there were not glaring deficiencies in a principal's leadership. The only way to conclude based on this paltry record that the plaintiff was discriminated against because he was white is to make the illogical and insupportable assumption that every time a black council member votes against a white candidate, the decision is motivated by race. This is impermissible....Racial discrimination against whites is forbidden, it is true, but no presumption of discrimination can be based on the mere fact that a white is passed over in favor of a black....The notion that all back decision-makers are driven by this single issue rests on just the type of stereotype the civil rights laws were designed to prevent from infecting personnel decisions; it would be painfully ironic if those same laws were here used to perpetuate such stereotypes. Mere subjective believes by the plaintiff--without the backing of hard evidence--cannot prove that an action was inspired by improper motivations. ...

...Because there is no proof of discrimination, the district court's judgments against the four defendants were reversed.

VIDEOTAPES MAY BE USED IN THE EVALUATION PROCEDURES RESULTING IN TEACHER DISMISSAL.

Roberts v. Houston Independent School Dist.
788 SW 2d 107 (1990)

Court of Appeals of Texas

EVANS, CHIEF JUSTICE. This is an appeal from a judgment upholding a school district's administrative decision to terminate appellant's employment for inefficiency or incompetency in the performance of duties. The cause was submitted to the trial court on an agreed stipulation of facts and exhibits, and on appeal, only a question of law is presented for review.

The stipulation of facts shows that appellant, Vena Roberts, had a continuing teacher's contract with the Houston Independent School District (school district). On numerous occasions during school years 1982-1983 and 1983-1984, the school district's assessment team, composed of an associate superintendent and an instructional supervisor, evaluated appellant's teaching performance. These evaluations included both written assessments and videotaping of appellant's classroom performance. The evaluation team used videotapes so that the teacher could more easily follow and understand the evaluation team's observations and criticisms. Appellant objected to the use of videotaping in her classroom.

Both the written evaluations and videotapes revealed problems with appellants's teaching performance. Appellant was told of these problems, but according to the assessment team, she did not correct or improve her performance. Based on appellant's classroom performance, the assessment team recommended that the school district terminate her employment at the end of the 1983-84 school year. (Appellant's contract allowed for termination for inefficiency or incompetence in the performance of duties.) The deputy superintendent accepted this recommendation and, in turn, recommended termination to the general superintendent. The deputy superintendent and three members of the assessment team met with appellant and notified her of the recommendation and the reason for their recommendation. On March 9, 1984, the board of education authorized the general superintendent to notify appellant that it had proposed her employment be terminated at the end of the 1983-84 school year....

Appellant then notified the school district of her desire to contest the proposed termination and asked for a public hearing, which was scheduled for June 2, 1984. About 45 days before the hearing, appellant and her attorney were notified of the date, time, place, and procedures to be used at the termination proceedings. Appellant and her attorney were later given a witness list, a description of the testimony to be provided at the hearing and a copy of the exhibits to be used. Appellant was not, however, given a copy of the videotape exhibits. Appellant asked for copies of all videotapes made of her classroom performance, and the school district refused. The school district did make the tapes available for appellant's review and inspection at its administrative offices.

On June 2, 1984, the school board heard testimony from appellant's supervisors, and it reviewed approximately 100 documents offered as evidence of appellant's classroom performance. The school board also viewed a 30-minute videotape, which included excerpts from the five separate videotapes make of appellant's classroom performance. The five tapes were all used by the assessment team in its evaluation of appellant's classroom performance.

Appellant chose not to testify at the hearing, and she did not present any witnesses or evidence on her own behalf. She limited her presentation to the cross-examination of appellee's witnesses. The hearing lasted approximately six hours, and at the end of the hearing, the school board voted unanimously to terminate appellant's employment at the end of the 1983-84 school years.

In her first point of error, appellant claims the trial court's judgment is flawed, as a matter of law, because she was denied both procedural and substantive due process in the termination proceedings.

I. Procedural due Process

Appellant, as the holder of a continuing contract with the school district, possessed a property interest in her continued employment. The state may not deprive a person of a property interest without due process of law. At the very least, the law requires that a public employee with a protected right in continued employment be given notice and an opportunity to reply prior to termination.

The record reflects that appellant did receive notice and had an opportunity to respond before the termination of her employment.

On February 29, 1984, the deputy superintendent and members of the assessment team met with appellant, and explained their recommendation that the school district terminate her employment at the end of the 1983-84 school year. On March 12, 1984, the general superintendent wrote to appellant, notifying her of the proposed termination of her employment. In that letter, the general superintendent discussed the sections of appellant's contract upon which the school district was basing the proposed termination, and he enumerated specific complaints about her teaching performance. The superintendent stated that appellant had 10 days after receipt of the letter to notify him of her desire to contest the proposed termination, and that she could obtain copies of the evaluation reports and memoranda "touching or concerning" her "fitness or conduct as a teacher."

Appellant also received notice of the time, date, and place of the termination hearing....Appellant's principal contention is that she did not have notice of the contents of the edited videotape. We reject this contention. Appellant was told she could view the unedited videotapes at the school district's office during regular business hours at any time between May 17, 1984, and June 2, 1984. This was about 10 days before the hearing. Appellant had also previously reviewed the tapes with the members of her assessment team after each evaluation....[S]he was given ample opportunity to view the five videotapes from which the composite was made. She simply chose not to do so.

II. Substantive Due Process

Appellant argues that the administrative hearing, which resulted in her termination, violated her right of due process because "of the nature of the evidence presented and the resulting inability of (appellant) to defend against the evidence as presented."

In evaluating a substantive due process claim, based on allegedly arbitrary state action in academic matters, a reviewing court must ascertain whether the state's action was "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." Regents of the Univ. of Michigan v. Ewing....

Here, the school board listened to six hours of testimony and other evidence before deciding to terminate appellant's employment. The board reviewed appellant's teaching evaluations, listened to testimony of appellant's supervisors, and viewed a 30-minute composite videotape of appellant's teaching. Appellant was represented by her attorney during the hearing, she was given an opportunity to testify and to present witnesses on her own behalf, and she was allowed to cross-examine the witnesses called by the school district. Appellant could have even shown portions of the unedited videotapes, had she chosen to do so.

We conclude that the school board did not act arbitrarily or deviate from accepted academic norms in reaching its judgment to terminate appellant's employment....

We overrule appellant's first point of error.

In her second point of error, appellant contends that the trial court erred in granting a judgment for the school district because the termination proceedings violated her right of privacy. Under this point, appellant argues that she had an expectation of privacy in her classroom to be free from intrusion by videotaping, and that by videotaping her performance, over her objection, the school district violated her right of privacy as well as its own policy....

...[W]e conclude that appellant has not demonstrated that she had a "reasonable expectation of privacy" in her public classroom. The record shows that appellant was videotaped in a public classroom, in full view of her students, faculty members, and administrators. At no point, did the school district attempt to record appellant's private affairs.

The activity of teaching in a public classroom does not fall within the expected zone of privacy....The right of privacy has been defined as the right of an individual to be left alone, to live a life of seclusion, to be free from unwarranted publicity. There is no invasion of the right of privacy when one's movements are exposed to public views generally.

The second point of error is overruled.

Appellant contends, in her third point of error, that the school district violated its own policy [concerning] videotaping. ...The language in the [administrative procedures guide] expressly authorizes the principal to make arrangements for videotaping, and the quoted section does not require that the teacher must request or give consent to the videotaping. We accordingly conclude that the videotaping of appellant did not violate any of the school district's policies or procedures.

The third point of error is overruled....

The judgment of the trial court is affirmed.

THE SCHOOL DISTRICT AND TEACHERS ARE NOT LIABLE FOR A CAMCORDER BEING HIDDEN IN THE WOMEN'S LOCKER ROOM BY MALE STUDENTS.

Roe v. North Adams Community School Corporation
647 NE 2d 655 (1995)

Court of Appeals of Indiana

FRIEDLANDER, Judge.

Mary Roe and Jane Doe (plaintiffs) appeal the trial court's grant of summary judgment entered in favor of The American Red Cross (Red Cross), Thomas W. Sheets, and the North Adams Community School Corporation (the school) [hereinafter collectively referred to as the defendants], which determined that the defendants were not liable for alleged injuries the plaintiffs received when an individual videotaped them as they undressed in a school locker room.

We affirm.

The facts most favorable to the plaintiffs...are that in May, 1989, the Red Cross offered a lifeguarding class designed and taught by Sheets, a Red Cross volunteer. Both plaintiffs enrolled in the program. Doe was a sixteen year-old sophomore student at Bellmont High School (Bellmont), and Roe was a fifteen year-old freshman at South Adams High School.

...The Red Cross made arrangements with the school for the use of the Bellmont pool for this class. The pool was made available to the Red Cross at no charge. The lifeguarding class was organized, operated, and sponsored by the Red Cross, and no school employees were involved in teaching or supervising the class. The students did not earn credit for taking the class.

During the school day and prior to the lifeguarding class, the locker rooms and the pool area were locked, and the only non-school personnel who had a key were the Parks and Recreation Department, who staffed the pool when it was being used for community purposes. The school did not permit Sheets to have a locker room key because it was "trying to be very careful with distribution of keys."...The Red Cross made arrangements with the school to have a custodian unlock the pool facilities just before the class began. After the classes, Sheets would inspect the pool and locker rooms and a custodian would lock the pool area.

Twenty-three individuals enrolled in the lifeguard program, and they typically met in a classroom for lecture and instruction at the beginning of class. The students would then proceed to the locker areas and change clothes.

Approximately one month before the classes were to begin, N.T., T.J., and several other Bellmont students concocted the idea to videotape the girls as they undressed in the locker room. During at least three of the lifeguarding classes, N.T. placed his grandparents' camcorder in one of the women's lockers and videotaped them while they changed clothes. T.J. served as a lookout while N.T. adjusted the camera. In order to disguise the camera and prevent its discovery, N.T. wrapped the camcorder in a towel and padlocked the locker shut. While Sheets conducted nightly inspections of the locker rooms, he never saw the camcorder.

In December, 1989, several students informed Bellmont's principal that a videotape existed depicting certain female students in various stages of undress. The principal began an investigation and T.J. eventually delivered a copy of the tape to John Smitley, the school custodian. Smitley gave the tape to the principal, and he learned that N.T. was responsible for the filming because N.T.'s face appeared at the beginning of the tape. The tape also depicted N.T. adjusting the camcorder. When the principal confronted N.T., he explained that all copies of the tape had been destroyed. N.T. was eventually expelled from school and the principal gave the tape to the local police.

On may 2, 1991, both plaintiffs filed four-count complaints against the defendants seeking damages for injuries as a result of the videotaping episodes. Courts I and II related to the school, while counts III and IV related to Sheets and the Red Cross....

Contrary to the plaintiffs' arguments, there is no support for a finding that the school assumed a duty to provide security for the Red Cross classes. The evidence only demonstrates that the school agreed to provide the facilities to the Red Cross for the classes, and the custodians were on duty to primarily provide cleaning and maintenance services....

...[I]t is clear that the "factors" cited by the plaintiffs fail to support their argument that the school undertook to control security surrounding the Red Cross class.

In order for the plaintiffs to recover, they were also bound to show that N.T.'s conduct was foreseeable by the school. In analyzing the foreseeability component of duty, we focus on whether the individual actually harmed was a foreseeable victim and whether the type of harm actually inflicted was reasonably foreseeable.... "[T]he duty of reasonable care is not, of course, owed to the world at large, but rather to those who might reasonably be foreseen as being subject to injury by the breach of the duty." Webb Imposition of a duty is limited to instances where a reasonably foreseeable victim is injured by a reasonably foreseeable harm....

In the case before us, the plaintiffs have not demonstrated that there was any duty on the part of the school to foresee an act such as N.T.'s. In examining the evidence in a light most favorable to the plaintiffs, there is simply no showing, as a matter of law, that N.T.'s conduct was foreseeable or that the school's alleged negligence proximately caused the plaintiffs injuries.

The plaintiffs next assert that "[t]he record confirms the existence of a relationship between Plaintiffs, Sheets and the Red Cross sufficient to lead to a duty of reasonable care."...[A] duty to warn and protect against a particular danger does not exist unless the party allegedly subject to the duty has knowledge of the danger....

..[T]here was nothing visible to Sheets or the Red Cross suggesting the presence of a potentially dangerous condition. The video camera was obviously concealed and, as a matter of law, neither the Red Cross nor Sheets had any duty to protect the plaintiffs from the incident because they had no knowledge of the risk.

...[T]he plaintiffs have failed to allege any facts supporting a type of relationship giving rise to a duty to protect them from the videotaping incident. The only relationship the Red Cross had to the plaintiffs and the video camera incident was that it sponsored a lifesaving class conducted on school premises in which the plaintiffs participated. The record also fails to show that Sheets assumed a duty that would guarantee security sufficient to prevent a third party from concealing a video camera in the women's locker room. Neither Sheets nor the Red Cross had any control over the security on the school premises, and the Red Cross did not have any control over the building at any time outside of the class. The record is devoid of any evidence establishing a "special relationship" between the Red Cross, Sheets, and the plaintiffs that imposed a duty to control access to the premises in order to prevent a hidden camera from being installed in the locker area.

The trial court therefore properly determined that neither Sheets nor The Red Cross had a duty to protect the plaintiffs from any harm caused by the videotaping incident....

Judgment affirmed.

THE TEACHER'S PUBLIC LETTER ON SEXUAL DISCRIMINATION ADDRESSED A PUBLIC CONCERN.

Seemuller v. Fairfax County School Board
878 F 2d 1578 (1989)

United States Court of Appeals, Fourth Circuit

BUTZNER, Senior Circuit Judge. The sole issue in this appeal is whether a public school teacher's letter addressed a matter of public concern. Donald Seemuller, a physical education teacher at Lake Braddock High School in Fairfax County, Virginia, appeals the district court's order directing a verdict in favor of the Fairfax County School Board and George Stepp, the principal of Lake Braddock, in this...action alleging violation of Seemuller's first amendment right to freedom of speech. Seemuller contends that the district court erred in ruling that his speech, a letter to the editor published in the school's newspaper, was not on a matter of public concern but was simply a personal response to criticism...[W]e find that Seemuller's speech commented on a matter of public concern, [and] vacate the district court's order....

In December 1986, Lake Braddock's school newspaper, The Bear Facts, published an anonymous letter to the editor written by students and captioned "Angered Girls Fight P.E. Discrimination." The letter complained about "a few male chauvinistic P.E. teachers" and gave several supporting examples....

Seemuller responded to the complaint by submitting a letter to the newspaper. Before publication, the paper's faculty advisor and the principal read the letter. They did not object to its publication or ask Seemuller to withdraw it. The principal did not warn Seemuller that publication would lead to disciplinary action. He did not speak to Seemuller about the letter until after it was published.

The paper published the letter under the caption "P.E. Teacher Defends." The letter read as follows:

> Dear Editor,
>
> As a male physical education teacher at Lake Braddock, I was somewhat taken aback by the recent letter accusing some members of our staff of chauvinism, I cannot speak for every member of the staff, but as for myself, I like girls, and the many things they can accomplish. My two females at home are a sixteen year old whom I permit to chauffeur my son to and from his many activities, and my wife who is an adequate cook and housekeeper. My wife also does light yard work enabling me to play golf, and pursue many other masculine

> activities.
>
> Hopefully this letter will convince those girls in physical education at Lake Braddock that we have the utmost respect for their feminine talents.
>
> Sincerely,
> Don Seemuller

In addition to being distributed to students at Lake Braddock, the school newspaper is mailed to approximately 3,600 families in the school's community. The newspaper's policy is to publish letters to the editor from students, teachers, and parents.

Following publication of Seemuller's letter, the principal told Seemuller that he had received complaints from the community, faculty members, and the Lake Braddock Human Relations Committee. He also said that Seemuller might receive a "needs improvement" rating in "Professional Responsibility" in his final evaluation in April and suggested that Seemuller meet with the Human Relations Committee and write a letter of apology to the newspaper.

Seemuller met with the committee and submitted a letter of apology to the newspaper in May 1987 which appeared under the heading, "Seemuller apologizes for Satirical Response."...

The paper appended the following statement to Seemuller's letter:

> EDITOR'S NOTE
>
> The editorial board respects Mr. Seemuller for discussing and confronting the sexual bias problem that some students see in the physical education department. However, this letter should have been unnecessary. Mr. Seemuller's original statement was facetious and not meant to be offensive....

In his final evaluation in April 1987, as a result of the publication of his letter, Seemuller was rated as "Needs Improvement" in "Professional Responsibility." Seemuller alleges that because of this evaluation he did not receive his step increment in pay for the 1987-88 school year.

Seemuller filed a grievance in accordance with school board regulations and state law. The deputy superintendent of schools who was designated by the superintendent to consider Seemuller's grievance acknowledged that his letter "was published in the context of school and community concerns about the treatment of females in school programs." The deputy superintendent concluded that Seemuller was able to exercise his "freedom of speech because [his] letter was published." Without further explanation, the school board denied the grievance after reviewing the documents and recommendation of the superintendent. Seemuller then brought this action.

The Supreme Court has explained in a series of cases during the last two decades the principles governing our inquiry. The initial question in deciding a public employee's entitlement to the protection of the first amendment is whether his speech addresses a matter of public concern....Connick v. Myers....[A] government employee's speech is protected from disciplinary action by his employer if "the interests of the [employee], as a citizen, in commenting upon matters of public concern" outweigh "the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Education.... [T]he only issue on appeal is whether Seemuller's letter may be "fairly characterized as constituting speech on a matter of public concern." Connick....

Connick also explains that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."...In conducting this examination, an appellate court is obligated to make "an independent constitutional judgment on the facts of the case."...

Connick dealt with the complaint of an employee who was discharged after she circulated a questionnaire that primarily sought responses about employment conditions in the office where she worked....

In applying the foregoing principles to the facts of this case, the starting point is the anonymous letters written by students about the physical education department. The paper's editor recognized its content by captioning it "Angered Girls Fight P.E. Discrimination." The letter protested that teachers practice discrimination based on sex. The letter addressed an issue that is no less a matter of public interest than a charge that a school system engages in discrimination based on race....

Seemuller's letter, submitted for publication several weeks later, was a response to the anonymous letter. It started out by stating that "I was somewhat taken aback by the recent letter accusing some members of our staff of chauvinism." The editor recognized Seemuller's letter as a defense of the department, for it was published with the caption: "P.E. Teacher Defends." Seemuller's letter was intended to address and did address the complaint of discrimination based on sex--a matter of public concern. This is apparent from the letter itself and from Seemuller's testimony at trial: "I was poking fun or making light or telling them to lighten up a little bit, that maybe what they had heard wasn't what really was going on. Asked to describe the letter, he testified: "My letter is, it is a humorous attempt at satire to point out that misperceptions can occur."

In his letter of apology, Seemuller explicitly stated that in his first letter he addressed "male chauvinism in the physical education department" and that the "intent of the letter was satirical in nature." The editor understood that Seemuller's first letter was a "Satirical Response" to the anonymous letter protesting discrimination based on sex. The editor appended a note saying the letter of apology was unnecessary and expressing the hope that Seemuller's treatment will not "scare others from contributing." The editor was aware of the danger of chilling speech protected by the first amendment.

The deputy superintendent of schools who presided over the grievance hearing recognized that Seemuller's letter dealt with a matter of public concern. In her decision she found as a fact that Seemuller's "letter was published in the context of school and community concern about the treatment of females in school programs." The grievance decision acknowledges that Seemuller was exercising his freedom of speech.

The record disclosed that even before the anonymous letter was published in December 1986 some girls had complained that they were treated as second class citizens in the school. The exchange of correspondence between the anonymous letter writer and Seemuller sparked much livelier discussion about discrimination based on sex. The day after Seemuller's letter was published the principal met with 32 girls regarding discrimination and assured them he would not tolerate it. Later the school human relations committee met, deplored discrimination based on sex, and urged the principal to take steps to prevent it. Some people, taking Seemuller's letter literally, were offended by it and criticized it as demeaning women. Nevertheless, the fact that some persons considered the letter to be inappropriate or controversial "is irrelevant to the question whether it deals with a matter of public concern."..."[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."...

Seemuller's use of satire to comment on a matter of public concern did not deprive him of the protection afforded by the first amendment...[T]he Supreme Court has observed that the first amendment protects satirists....

In sum, we conclude that a complaint published in a school newspaper that a public school discriminates on the basis of sex raises a question of public concern. Seemuller's published response to the complaint also commented on a matter of public concern.

A TEACHER'S AUTHORITY TO MAKE ASSIGNMENTS AND GIVE GRADES MAY PLACE SOME LIMITATIONS ON A PUBLIC SCHOOL STUDENT'S FREE SPEECH RIGHTS.

Settle v. Dickson County School Board
53 F 3d 152 (1995)

United States Court of Appeals, Sixth Circuit

MERRITT, Chief Judge.

The issue before us is whether Dana Ramsey, a junior high school teacher in Dickson, a small Tennessee town, violated the free speech rights of one of her ninth grade students, Brittney Settle, by refusing to accept a research paper entitled "The Life of Jesus Christ," and by giving her a "zero" for failing to write on another topic. Although this paper topic concerns religious subject matter, the plaintiff does not bring her case under the Free Exercise Clause of the First Amendment. Instead, she has chosen to challenge Ms. Ramsey's rejection of her topic as restricting her rights of free speech under the First Amendment. The district court granted summary judgment for the defendants and dismissed the case. We now affirm the district court's judgment.

During the week of March 15, 1991, Ms. Ramsey assigned a research paper to her ninth-grade class at Dickson County Junior High School. In assigning the paper, the teacher stressed to the students that she wanted them to learn how to research a topic, synthesize the information they gathered, and write a paper using that information. Thus, as she explained, students could not merely expound on their own ideas. She required that each student use four sources in performing the research.

Each student could select his or her own topic, subject to the teacher's approval. She required only that each topic be "interesting, researchable and decent."...

The plaintiff originally signed up to write a paper on "Drama." Subsequently, she changed her mind after deciding that the topic might be too broad. Without Ms. Ramsey's prior approval, plaintiff attempted to submit an outline for a paper entitled "The Life of Jesus Christ." The teacher refused to accept the outline and told plaintiff she would have to select another topic. At this point, plaintiff's father intervened to complain and met with the principal of the school, Ms. Ramsey, and other school officials. Ms. Ramsey told plaintiff's father that she would accept a paper on religion as long as it did not deal solely with Christianity or the Life of Christ. On April 3, plaintiff attempted to submit another outline, with the title "A Scientific and Historical approach to Jesus Christ." Ms. Ramsey rejected this outline as well. Ultimately, the principal, the superintendent of schools, and the Dickson County School Board all expressed their support for Ms. Ramsey's decision and noted that the teacher had not exceeded her discretion as far as they were concerned. Plaintiff and her family decided to make an issue of the matter before the School Board and then in court.

In her statement at a hearing before the School Board, and in depositions taken for the litigation of this case, Ms. Ramsey has explained that she refused to allow plaintiff's topic for a combination of reasons. First, she stated that the student had failed to receive permission to write on the topic prior to handing in the outline. Because plaintiff did not adhere to the requirement of submitting her topic for her teacher's approval, she had to choose another topic.

Second, Ms. Ramsey said that she believed that it would be difficult for her to evaluate a research paper on a topic related to Jesus Christ. She stated that she knew that plaintiff had a strong personal belief in Christianity that would make it difficult for her to write a dispassionate research paper. Furthermore, Ms. Ramsey believed that the paper would be difficult to grade because plaintiff might take any criticisms of the paper too personally. Even remarks regarding grammar or organization might be misinterpreted as criticisms of plaintiff's religious believes. Ms. Ramsey thought it would be wiser to avoid such potential misunderstandings.

Third, the teacher indicated that she "just knew that we don't deal with personal religion--personal religious believes. It's just not an appropriate thing to do in a public school....People don't send their children to school for a teacher to get in a dialogue with personal religio[us] beliefs. They send them to learn to read and write and think. And you can do that without getting into personal religion."...

Fourth, the teacher felt that because plaintiff knew a lot about Jesus Christ, she could produce an outline without doing any significant research, and thus defeat the purpose of the exercise. The teacher stated "it was a lot easier to write a quick little preliminary outline on Jesus Christ, which she knew a lot about, which most of my students knew a lot about."...Further, she said that part of the purpose of the paper was to have the students research a paper on a subject with which they were unfamiliar....

Fifth, Ms. Ramsey at one point during her testimony before the School Board stated "the law says we are not to deal with religious issues in the classroom."...She seems to have thought that she should not allow plaintiff to write on the topic of her choice because the law may prohibit this kind of religious paper in public school classrooms.

Sixth, while testifying before the school board, Ms. Ramsey also stated that she rejected the topic because the assignment required the use of four sources and that "all the sources that you [are] going to find documenting the life of Jesus Christ derive from one source, the Bible."...She seems to have meant primary or original sources, but during a previous deposition she said she allowed secondary sources. "I required that they have two books and two encyclopedias or resources, but they could substitute using magazine articles or pamphlets."...

As a result of plaintiff's refusal to comply with the requirements Ms. Ramsey had specified, she received a zero for the assignment. The student subsequently sued Ms. Ramsey for violating her rights of free speech. Judge Wiseman dismissed the case on a motion for summary judgment relying on Hazelwood..., which upheld a school official's decision to censor a story in the school newspaper about pregnancy at the school. Plaintiff now appeals the district court's ruling on two grounds. She contends that as a matter of law, Ms. Ramsey violated her First Amendment rights as applied to the states by the Fourteenth Amendment, and alternatively argues that there is a dispute of material fact as to what Ms. Ramsey's actual reasons were for refusing to let her write the paper on Jesus Christ, making summary judgment inappropriate. We take up these arguments in turn.

After reviewing the precedents concerning students' rights of free speech within a public school, we find few cases that address the conflict between the student's rights of speech in the classroom and a teacher's responsibility to encourage decorum and scholarship, including her authority to determine course content, the selection of books, the topic of papers, the grades of students and similar questions. Students do not lose entirely their right to express themselves as individuals in the classroom, but federal courts should exercise particular restraint in classroom conflicts between student and teacher over matters falling within the ordinary authority of the teacher over curriculum and course content. "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." Epperson....

The free speech rights of students in the classroom must be limited because effective education depends not only on controlling boisterous conduct, but also on maintaining the focus of the class on the assignment in question. So long as the teacher violates no positive law or school policy, the teacher has broad authority to base her grades for students on her view of the merits of the students' work....Grades are given as incentives for study, and they are the currency by which school work is measured.

Plaintiff argues that Ms. Ramsey's rejection of her paper topic infringed upon her fundamental right to freedom of speech. The censorship in the Hazelwood case, referred to earlier, involved a school newspaper, a kind of open forum for students, and even there the Supreme Court said that "educators do not offend the First Amendment by exercising editorial control over the style and context of student speech in school-sponsored activities so long as their actions are reasonably related to legitimate pedagogical concerns."...Where learning is the focus, as in the classroom, student speech may be even more circumscribed than in the school newspaper or other open forum. So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.

Like judges, teachers should not punish or reward people on the basis of inadmissible factors--race, religion, gender, political ideology--but teachers, like judges, must daily decide which arguments are relevant, which computations are correct, which analogies are good or bad, and when it is time to stop writing or talking. Grades must be given by teachers in the classroom, just as cases are decided in the courtroom; and to this end teachers, like judges, must direct the content of speech. Teachers may frequently make mistakes in grading and otherwise, just as we do sometimes in deciding cases, but it is the essence of the teacher's responsibility in the classroom to draw lines and make distinctions--in a word to encourage speech germane to the topic at hand and discourage speech unlikely to shed light on the subject. Teachers therefore must be given broad discretion to give grades and conduct class discussion based on the content of speech. Learning is more vital in the classroom than free speech. All six of Ms. Ramsey's stated reasons for refusing to allow Brittney to write the paper fall within the broad leeway of teachers to determine the nature of the curriculum and the grades to be awarded to students, even the reasons that may be mistaken. It is not for us to overrule the teacher's view that the student should learn to write research papers by beginning with a topic other than her own theology. Papers on the transfiguration of Jesus and similar topics may display more faith than rational analysis in the hands of a young student with a strong religious heritage--at least the teacher is entitled to make such a judgment in the classroom.

...In Tinker, the Court held that a student could wear a black armband to protest the Vietnam War. But, the Court found central to its holding that wearing the armband would not "substantially interfere with the work of the school or impinge on the rights of other students."...The Court specifically stated that a school could limit otherwise protected speech if it did so as part of a "prescribed classroom exercise."...

Accordingly, the judgment of the district court is AFFIRMED.

A SCHOOL BOARD MEMBER HAS AN INDRIECT INTEREST IN A SPOUSE'S TEACHING CONTRACT.

Smith v. Dorsey
530 S 2d 5 (1988)

Supreme Court of Mississippi

EN BANC. On Petition for Rehearing Griffin, Justice, for the Court.

In this appeal this Court is asked to construe Section 109 as applied to contracts of teachers whose spouses are school board members. Stated differently, may a local school board contract with spouses of its members?

Proceedings in the lower court were held on October 9, 1986. Testimony at trial and stipulated exhibits include documents issued to defendants by the Secretary of State certifying them as Claiborne County School Board members' contracts for employment for their spouses--Jo Anne Collins Smith, Mary Jennings, Ernestine Williams and Catherine Knox--as teachers in the Claiborne County School District, at the time defendants served as board members; the teachers' payroll records from 1980-1986; and minutes of the Claiborne County School Board from 1980-1986.

On October 10, 1986, the chancellor entered an order finding all defendants to be in violation of Section 109. He further adjudicated the defendants' spouses' contracts to be null and void, and that each defendant had an indirect interest in these contracts as he had been a Trustee of the Claiborne County Board of Education when said Board approved one or more contracts for the employment of the defendants' spouses.

Finally, the chancellor ordered claims of restitution be made against the spouses of the defendants because of the Section 109 violations. The Court found that these violations as to all defendants and their spouses had existed for several years up to and including the present date.

This appeal followed.

Article 4, Section 109 of the Mississippi Constitution of 1890 provides:

> No public officer or member of the legislature shall be interested, directly or indirectly, in any contract with the state, or any district, country, city or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member,

during the term for which he shall have been chosen, or within one year after the expiration of such term.

In Frazier, supra [504 So. 2d 675 (Miss. 1987)] at 693, we said that this section prohibits any officer from:

(a) having any direct or indirect interest in any contract
(b) with the state of any political subdivision
(c) executed during his term of office or one year thereafter, and
(d) authorized by any law, or order of any board of which he has a member.

The chancellor found that each defendant had an indirect interest in his spouse's contract as prohibited by Section 109. We would agree....

Without hesitation we find that logic dictates some manifest interest by appellants herein in the public school employment contracts of their wives. Appellants are directly responsible for the hiring and firing of their spouses. Additionally, the record indicates that these school board members share fully in the process behind which the salaries are awarded to public school teachers in their district. This is not to say that we question the integrity or fairness of these board members in any way; we simply recognize that each has an indirect interest in his wife's contract which violates the constitutional provision.

Next, we address the question of restitution ordered by the lower court and brought up on appeal.

In the trial below plaintiffs and appellees herein neither plead or raised the question of any bad faith committed by appellants for their role in the employment of their spouses. Nor did the chancellor make nay finding of such.

In our review of the record, we can see no allegation by these Claiborne County taxpayers that they did not receive value for services performed by the teachers, whose time of employment ranged from two (2) to thirty-three (33) years. Further, in at least one instance the record shows that a spouse of one board member had been teaching long before his election to that body....

The record reflects that the conduct of the defendants here had been the general practice in Claiborne County for many years, and we would concede that a similar case could be made in many other counties of the state. The claim for restitution, however, should be denied on other grounds. There is no way the parties can be put back in their original position before the teaching contracts were entered. For restitution to be equitable, there would have to be some way of restoring to the teachers the value of the services they have rendered to the schools. Obviously, this cannot be done. To require restitution under the facts of this case would place these school teachers in a position where they would have served as public school teachers without pay, and in several instances for a number of years. The equitable remedy of restitution should not be enforced in such an inequitable way.

We hold that the above premise, coupled with the fact that there is no allegation or finding of bad faith on the part of the appellants, would make it grossly inequitable to require restitution on the peculiar facts presented here....

We, therefore, uphold the chancellor's order finding appellants herein have been and are in violation of Sec. 109; declaring the contracts of appellants's spouses to be null and void' and enjoining any further payment of salaries, etc. to said spouses while appellants remain as members of the Board of the Claiborne County School District and for a period of one year after the defendants shall leave their official capacities....

THE STATE HAS THE POWER TO SET ACADEMIC REQUIREMENTS FOR PARTICIPATION IN EXTRACURRICULAR ACTIVITIES.

Spring Branch Independent School District v. Stamos
695 SW 2d 556 (1985)

Supreme Court of Texas

RAY, JUSTICE. This is a direct appeal brought by the Attorney General, representing the Texas Education Agency, and others, seeking immediate appellate review of an order of the trial court which held unconstitutional, and enjoined enforcement of, a provision of the Texas Education Code....We hold that the statutory provision is not unconstitutional and reverse the judgment of the trial court.

Chris Stamos and others brought this suit on behalf of Nicky Stamos and others, seeking a permanent injunction against enforcement of the Texas "no pass, no play" rule by the Spring Branch and Alief Independent School Districts. The Texas Education Agency and the University Interscholastic League intervened. The district court issued a temporary restraining order and later, after a hearing, a temporary injunction enjoining all parties from enforcing the rule. This court issued an order staying the district court's order and setting the cause for expedited review.

THE "NO PASS, NO PLAY' RULE

The Second Classed Session of the 68th Legislature adopted a package of education reforms known as "H.B. 72." A major provision of these educational reforms was the so-called "no pass, no play" rule, which generally requires that students maintain a "70" average in all classes to be eligible for participation in extracurricular activities....

ISSUES RAISED

The sole issue before this court is the constitutionality of the no pass, no play rule. The district court held the rule unconstitutional on the grounds that it violated equal protection and due process guarantees. The burden is on the party attacking the constitutionality of an act of the legislature. There is a presumption in favor of the constitutionality of an act of the legislature.

This court has long recognized the important role education plays in the maintenance of our democratic society. Article VII of the Texas Constitution " discloses a well-considered purpose on the part of those who framed it to bring about the establishment and maintenance of a comprehensive system of public education, consisting of a general public free school system and a system of higher education." Section 1 of article VII of the Constitution establishes a mandatory duty upon the legislature to make suitable provision for the support and maintenance of public free schools. The Constitution leaves to the legislature alone the determination of which methods, restrictions, and regulations are necessary and appropriate to carry out this duty, so long as that determination is not so arbitrary as to violate the constitutional right of Texas' citizens.

Equal Protection

Stamos challenges the constitutionality of the "no pass, no play" rule on the ground that it violates the equal protection clause of the Texas Constitution. The first determination this court must make in the context of equal protection analysis is the appropriate standard of review. When the classification created by a state regulatory scheme neither infringes upon fundamental rights or interests nor burdens an inherently suspect class, equal protection analysis requires that the classification be rationally related to a legitimate state interest. Therefore, we must first determine whether the rule burdens an inherently suspect class or infringes upon fundamental rights or interests.

The no pass, no play rule classifies students based upon their achievement levels in their academic courses. We hold that those students who fail to maintain a minimum level of proficiency in all of their courses do not constitute the type of discrete, insular minority necessary to constitute a "suspect" class. Thus, the rule does not burden an inherently "suspect" class....

Stamos also argues that the rule is subject to strict scrutiny under equal protection analysis because it impinges upon a fundamental right, i.e., the right to participate in extracurricular activities. We note that the overwhelming majority of jurisdictions have held that a student's right to participation in extracurricular activities does not constitute a fundamental right....

In Bell, a school regulation prohibited married students from participating in extracurricular activities. Because the regulation impinged upon the fundamental right of marriage, the court of appeals held the regulation subject to strict scrutiny and struck it down because the school district had shown no compelling interest to support its enforcement. The present of a fundamental right (marriage) distinguishes Bell from the present case.

Fundamental rights have their genesis in the express and implied protections of personal liberty recognized in federal and state constitutions. A student's "right" to participate in extracurricular activities does not rise to the same level as the right to free speech or free exercise of religion, both of which have long been recognized as fundamental rights under our state and federal constitutions. We adopt the majority rule and hold that a student's right to participate in extracurricular activities per se does not rise to the level of a fundamental right under our constitution.

Because the no pass, no play rule neither infringes upon fundamental rights nor burdens an inherently suspect class, we hold that it is not subject to "strict" or heightened equal protection scrutiny....

The no pass, no play rule distinguishes students based upon whether they maintain a satisfactory minimum level of performance in each of their classes. Students who fail to maintain a minimum proficiency in all of their classes are ineligible for participation in school-sponsored extracurricular activities for the following six-week period, with no carry over from on school year to the next. The rule provides a strong incentive for students wishing to participate in extracurricular activities to maintain minimum levels of performance in all of their classes. In view of the rule's objectives to promote improved classroom performance by students, we find the rule rationally related to the legitimate state interest in providing a quality education to Texas' public school students....

Procedural Due Process

We begin our analysis of the due process arguments in this cause by recognizing that the strictures of due process apply only to the threatened deprivation of liberty and property interests deserving the protection of the federal and state constitutions. The federal courts have made it clear that the federal constitution's due process guarantees do not protect a student's interest in participating in extracurricular activities. We must, then examine our state constitution to determine whether its due process guarantees extend to a student's desire to participate in school-sponsored extracurricular activities.

A property or liberty interest must find its origin in some aspect of state law. Nothing in either our state constitution or statutes entitles students to an absolute right to participation in extracurricular activities. We are in agreement, therefore, with the overwhelming majority of jurisdictions that students do not possess a constitutionally protected interest in their participation in extracurricular activities. Therefore, the strictures of procedural due process do not apply to the determination by a campus principal,...as to whether a student who fails an identified honors or advanced course shall be permitted to participate in extracurricular activities.

Substantive Due Process

Stamos cites Spann...to support his argument that the rule violates principles of fundamental fairness and notions of substantive due process by giving school principals discretion to determine whether students who fail honors or advanced courses may participate in extracurricular activities. In Spann, this court declared void a city ordinance that required persons seeking to construct commercial buildings within residential areas to first obtain the consent of both neighboring residents and the city building inspector. There, we found that the ordinance provided no standards for builders or building inspectors with regard to the proper design for such buildings. By leaving the approval for such buildings "subject to the arbitrary discretion of the inspector," the ordinance violated the would-be builders' property right to use their property as they saw fit. This court emphasized that the ordinance in Spann infringed upon well-recognized property right by permitting wholly arbitrary limitations upon the uses which owners could make of their property.

In this present case, appellees liken the school principals' unfettered discretion in determining both which classes shall constitute "advanced" or "honors" courses and whether students failing such classes may participate in extracurricular activities to the building inspectors' unfettered discretion over approving commercial building plans. Spann is distinguishable from the obvious reason that a recognized property interest was affected by the Dallas ordinance. As stated previously, students have no constitutionally protected interest in participation in extracurricular activities. Because no constitutionally protected interest is implicated by this delegation of authority to school principals, no violation of due process, substantive or procedural, results therefrom.

We do not agree with Stamos' argument that a school principal's exercise of discretion pursuant to the "honors" exception to the rule is shielded from all review. Arbitrary, capricious, or discriminatory exercise of a school principal's discretion pursuant to subsection 21,920(b) of the Texas Education Code may well give rise to claims based upon equal protection ground....Accreditation audits of schools and school district may also afford relief against improper utilization of the "honors" exception. We also note there are no findings of fact before us that any of the student-plaintiffs received failing grades in honors or advanced courses....

Accordingly, we reverse the district court's judgment with regard to the constitutionality of section 21.920 of the Texas Education Code and dissolve the temporary injunction order by the district court.

A LOCAL BOARD OF EDUCATION HAS THE POWER TO REQUIRE A PHYSICAL EXAMINATION OF A TEACHER RETURNING FROM MEDICAL LEAVE.

Strong v. Board of Education of Uniondale
Union Free School District
902 F 2d 1208

United States Court of Appeals, Second Circuit

IRVING R. KAUFMAN, CIRCUIT JUDGE: the primary issue presented is whether a local school board denied a tenured public school teacher due process by refusing to allow her to return from an extended absence before she provided medical records and submitted to a physical examination by the school board doctor. In affirming the grant of summary judgment below, we hold that procedural due process is satisfied when a teacher in such circumstances is provided notice and an opportunity to respond to the adverse action of the school board, and when the state also affords a mechanism for obtaining judicial review of the board's decision on a subsequent petition for reinstatement. In addition, we find no constitutional violation of appellant's interest in privacy.

BACKGROUND

Appellant Marilyn Strong has been employed since 1980 by the Uniondale Union Free School District, in Nassau County, New York (School District). She has taught sixth grade at Northern Parkway Elementary School since 1981, and was awarded tenure in 1984.

From May 17, 1988 through the end of the academic year in late June, Strong was absent from the classroom because of illness. On June 8, after the School District inquired into the condition of its employees' health, it received a terse note from Strong's personal physician describing her as suffering from "severe nosebleed, vertigo, [and] arthritis."

In addition, Strong signed an insurance form...and forwarded it to the school District in July, indicating she was currently "disabled" and that the date of her return to work was "unknown." Significantly, the form contained an "Authorization to Obtain Information" clause directly above Strong's signature which explicitly authorized any doctor who had treated her to release "any and all information" concerning her medical history to the insurance company.

During the ensuing summer months, the School District sought in vain to communicate with Strong. Registered letters to her home address went unclaimed; repeated efforts to reach her by telephone proved futile. Moreover, Strong's mother purportedly refused to provide the School District with her daughter's current address.

Strong explains by alleging that she was under doctor's orders not to contact her employers because it made her ill to do so.

Unsuccessful in its efforts to contact Strong directly, the School District sent a letter dated August 17, 1988 to Strong's counsel, who had been retained pursuant to an unrelated discrimination claim against it. The letter directed Strong to produce an evaluation by her treating physician of her medical condition indicating whether she would be capable of resuming her teaching post. The communication specifically required Strong to provide "the name of all doctors she has seen since the commencement of her illness, along with releases permitting such doctors to provide the District with her medical records."

In response, Strong's lawyers stated that she would be returning to work at the start of the 1988-1989 school year, but omitted any discussion of their client's health or medical records. Accordingly, on August 29 the School District asserted that Strong needed to provide "her medical records and history" to the School District's physician and be examined by him before returning to the classroom. Strong did not comply.

When Strong attempted to resume teaching on the first day of the new school year, September 6, 1988, School District Superintendent Alan Hernandez informed her (both orally and in subsequent letters summarizing their conversation) that she could not return until she submitted to a medical examination and produced her records. Strong indicated her willingness to be examined by the School District's doctor, but steadfastly refused to provide her medical records, except for a doctor's note stating that she has been treated "for chest pain, arthritis, palpitations, [and] headaches" and asserting her ability to return to teaching. The School District's doctor, however, maintained that he could not certify a teacher as fit to return from an extended illness without medical reports from that teacher's treating physician and that the conclusory assertions of Strong's personal physician fell far short of the information necessary to render an informed medical opinion.

On November 22, 1988, the Board of Education passed a resolution...instructing Strong to appear at the office of the School District's doctor for a physical examination. The resolution directed Strong to bring any and all medical records relating to her absence from school commencing May 16, 1988, to her examination so that the School District's physician could properly evaluate the status of her health. To date, Strong has neither submitted to an examination nor proffered her medical records. Since she has exhausted her accrued sick leave, Strong no longer receives a salary.

Strong initiated this suit in December 1988, alleging that the School District's action violated her constitutional rights to privacy and due process....

DISCUSSION

I. Due Process

Strong urges that before the School District acted to bar her from the classroom she should have been notified of the "charges" against her, given an explanation of the School District's evidence, and provided an opportunity to present her side of the story.

Strong's procedural due process claim triggers analysis under a familiar framework. The threshold issue is whether Strong asserts a property interest protected by the Constitution....If a protected interest exists, we must then determine whether the School District deprived Strong of that interest without due process. The constitutional contours of due process turn on the specific circumstances of the case, including the governmental and private interests at issue. Due process is a flexible concept requiring only such procedural protection as the particular situation demands.

Strong's position as a tenured teacher is indisputably a property interest protected by the fourteenth amendment. Whether the School District deprived her of that interest without affording adequate procedural safeguards thus depends on what process was due.

Under New York law a tenured teacher may be removed only pursuant to certain substantive and procedural safeguards, including notice and a full-blown adversarial hearing. On the other hand, the New York Court of Appeals has held that a prior hearing is not necessary before placing a tenured teacher on involuntary sick leave, i.e., inactive status without pay due to illness. Brown v. Bd. of Educ....213 NE 2d 314 (1965). The Brown court's decision rested on the fact that the plaintiff, unlike a teacher who had been suspended or removed, retained all of her rights as a tenured teacher and could apply at anytime to be returned to active status. The court noted, moreover, that an adverse decision on Brown's application for reinstatement could be reviewed...in state court.

In the instant appeal, Strong has neither been "removed" from her teaching position, nor has she been involuntarily placed on sick leave. Under New York law, a teacher who is not permitted to return from an extended voluntary sick leave because of a failure to supply medical records is not considered suspended or terminated. Rather, we face the mirror image of the situation confronted in Brown. Here, we have a tenured teacher who has been barred against her will from resuming teaching after a hiatus taken on her own initiative. Yet the result is the same. Be refusing to automatically reinstate her following her voluntary sick leave, the School District has barred her from working and effectively cut off her salary. As in Brown, strong retains the right to petition for reinstatement and to challenge the denial of that petition in state court.

We recognize that, ordinarily, procedural due process requires notice and an opportunity to be heard. But an important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted may justify postponing the opportunity to be heard until after the initial deprivation. In cases where a pretermination hearing is required, "an initial check" to determine whether there are reasonable grounds to support the proposed action is sufficient....Accordingly, deciding whether the procedures followed by the School District meet the constitutional minimum requires a balancing of the private and governmental interests at stake.

The private interest affected--the right of a tenured teacher to continue practicing her profession and receiving her salary--is substantial indeed. On the other hand, the School District had a strong interest in safeguarding the health and welfare of the students in the teacher's class and the other children attending the school; also, it had ample reason to question Strong's physical fitness to teach and to require more than conclusory assertions that she had regained her health.

Moreover, Strong received adequate notice in the August letters to her counsel that she was required to provide her medical records to the School District's doctor prior to returning to work. Contrary to Strong's assertions, the letters could not have provided details as to the "charges" against her, since there are no pending charges. The letters were not disciplinary; they merely sought information from which the School District's doctor could make a reasoned professional judgment about her fitness to teach.

Although Strong urges that there should have been some type of hearing before she was barred from the classroom, it is difficult to envision what would have transpired at such a hearing. She was adequately notified that the School District needed her medical records to assess her fitness to teach. The parties were well aware of each other's assertions and any further hearing would have amounted to an empty formality.

Moreover, as we have noted, adequate "post deprivation" procedures are available to protect Strong's property interest in her tenured teaching position. All the process that was due in this case has been provided.

II. Right to Privacy

Strong also contends that even if the procedures for barring her from automatically returning to work were fair, compelling her to disclose her medical records amounts to an unconstitutional invasion of privacy.

Legitimate requests for medical information by those responsible for the health of the community do not rise to an impermissible invasion of privacy. The Sixth Circuit recently upheld a city ordinance requiring employees returning from extended absences to divulge certain medical information. Gutierrez v. Lynch....We find persuasive the position of the Sixth Circuit in this similar setting. As we have noted, the School District has a strong interest in protecting the children under its care. Its request for Strong's medical records, limited to the period of her absence from school, was reasonably tailored in scope and does not violate her privacy rights.

A STUDENT WITH AIDS IS HANDICAPPED AND PROTECTED BY SECTION 504 OF THE FEDERAL REHABILITATION ACT.

Thomas v. Atascadero Unified School District
662 F Supp 376 (1987)

United States District Court, Central District of California

STOTLER, District Judge....

Plaintiffs Robin and Judy Thomas are the parents and guardians of Ryan Thomas and bring this action on his behalf. Ryan Thomas ia s five-year-old eligible under California law to attend kindergarten in the Atascadero Unified School District.

Defendant Atascadero unified School District...is a recipient of "federal financial assistance"....

Acquired Immune Deficiency Syndrome (AIDS) is the clinical manifestation of a dysfunction of the human immune system caused by a recently discovered virus....To date, there is no vaccine against or cure for AIDS. A range of symptoms may result from infection with the AIDS virus which have been classified by the Centers for Disease Control ("CDC") into four groups of symptoms: (I) early acute, though transient, signs of the disease; (II) asymptomatic infection; (III) persistent swollen lymphnodes; and (IV) presence of opportunistic disease and/or rare types of cancer, including one known as Kaposi's Sarcoma....

Ryan Thomas...became infected with the AIDS virus as an infant as the result of a contaminated blood transfusion received at Oakland's Children's Hospital where he was being treated for complications arising out of his premature birth. He suffers from significant impairment of his major life activities.

Ryan was diagnosed as being infected with the AIDS virus in early 1985. During the first four years of his life, Ryan Thomas had frequent pulmonary and middle ear problems as well as chronic lymphadenopathy. These difficulties are attributable to his infection with the AIDS virus.

For over a year, since the diagnosis that he was infected with the AIDS virus, and since his treatment for this condition began, Ryan's medical condition has improved....At this point it is unclear what course his medical condition will take. Both of Ryan's treating physicians, Dr. Fields and Dr. Church, have written to the School District indicating that there is no medical reason why Ryan cannot attend regular kindergarten classes.

The best available medical evidence shows that the AIDS virus is not spread in the air by infected droplets as are the common cold, influenza, and tuberculosis. The virus is fragile and is killed by most household disinfectants. The virus is transmitted from one person to another only by infected blood, semen, or vaginal fluids (and, possibly, mothers' mild). Transmission by either semen or blood accounts for virtually all reported cases.

There are no reported cases of the transmission of the AIDS virus in a school setting. The CDC has stated that "[n]one of the identified cases of...infection in the United States are known to have been transmitted in the school, daycare, or foster-care settings or through casual person-to-person contact."

The overwhelming weight of medical evidence is that the AIDS virus is not transmitted by human bites, even bites that break the skin. Based upon the abundant medical and scientific evidence before the Court, Ryan poses no risk of harm to his classmates and teachers. Any theoretical risk of transmission of the AIDS virus by Ryan in connection with his attendance in regular kindergarten class is so remote that it cannot form the basis for any exclusionary action by the School District.

In May 1986, the School District adopted a policy concerning the admission of students infected with "communicable diseases" including the...AIDS..virus. Pursuant to this policy a Placement Committee was created, including health professionals, parents, school officials and San Luis Obispo County's Public Health Officer, to advise the School Board on the placement of children covered by the Policy.

On August 28, 1986, the Placement Committee met to make a recommendation concerning Ryan's placement. At this meeting the Committee recommended Ryan's admission to kindergarten. This recommendation was accepted by the School Board on September 2, 1986. No other kindergarten student had his placement considered in this manner. The standard procedure in the District is for a child's parent to decide whether a child of kindergarten age will attend regular kindergarten classes.

Ryan attended kindergarten without incident from September 3 to 5, 1986. On September 8, 1986, Ryan was involved in an incident in which another child and Ryan got into a skirmish and Ryan bit the other child's pants leg. No skin was broken.

Defendant Avena instructed Plaintiffs to keep Ryan at home after the incident so that the Placement Committee could reconsider its August 28th recommendation in light of this incident and determine "whether or not Ryan's potential for again biting another student poses any danger to the health of others in the class." On September 12, 1986, the Placement Committee recommended that Ryan be evaluated by a psychologist. This recommendation was accepted by the School Board. No similar action was taken concerning the other child involved in this incident.

In late September, Dr. Marcus Shira, a psychologist employed by the San Luis Obispo County Board of Education conducted a "psychoeducational study" of Ryan. Dr. Shira prepared a report dated September 30, 1986, in which he concluded that Ryan would behave "aggressively in a kindergarten setting because his level of social and language skills and maturity was below those of his classmates. Dr. Shira could not predict what form such "aggressive" behavior might take. Specifically, he did not predict that Ryan would "bit again."

Based upon Dr. Shira's study, on October 2, 1986, the Placement Committee recommended that Ryan be kept out of class and in "home tutoring" for the rest of the academic year. The County Public Health Officer, Dr. Rowland, abstained from this decision. On October 6, 1986, the School Board voted to exclude Ryan from his class until January 1987, and to have Ryan evaluated before the decision to exclude him would be reconsidered.

Ryan suffered injury because of his exclusion from his kindergarten class after September 8, 1986, even though his injuries were not as great as they would have been if he was an older child.

In taking the actions outlined above, the School acted cautiously and reasonably in attempting to balance all the interests involved and to address the fear of AIDS which exists within the Atascadero community.

In August of 1985, the...CDC published information and recommendations concerning the education of children infected with the AIDS virus. Among the CDC's recommendations are the following:

> Decisions regarding the type of educational and care setting for HTLV-III\LAV-infected children should be based on the behavior, neurologic development, and physical condition of the child and the expected type of interaction with others in that setting. These decision are best made using the team approach including the child's physician, public health personnel, the child's parent or guardian, and personnel associated with the proposed care or educational setting. In each case, risks and benefits to both the infected child and to others in the setting should be weighed.
>
> For the infected preschool-aged child and for some neurologically handicapped children who lack control of their body secretions or who display behavior, such as biting, and those children who have uncoverable, oozing lesions, a more restricted environment is advisable until more is known about transmission in these settings. Children infected with HTLV-III\LAV should be cared for

> and educated in settings that minimize exposure of other children to blood or body fluids.

Substantially similar guidelines and recommendations were issued by the American Academy of Pediatrics (AAP) in March of 1986 and the California State Department of Education (SDE) in May of 1986.

Aside from its citation to the recommendations of the CDC, AAP, and SDE, the School District has presented no medical evidence to prove that the AIDS virus can be transmitted by human bites. The information and recommendations published by the CDC, AAP, and SDE cite no such medical evidence and do not, of themselves, prove that transmission by biting is possible.

The Defendant School District is a recipient of federal funds within the meaning of 29 U.S.C. section 794, section 504 of the Federal Rehabilitation Act of 1973.

Ryan Thomas is a "handicapped person" within the meaning of section 504 of the Rehabilitation act of 1973....

Ryan Thomas is "otherwise qualified" to attend a regular kindergarten class within the meaning of section 504 of the Rehabilitation Act of 1973. Defendants have failed to meet their burden of demonstrating that Ryan is not "otherwise qualified" to attend kindergarten....There is no evidence that Ryan Thomas poses a significant risk of harm to his kindergarten classmates or teachers.

Ryan Thomas has been subjected to different treatment from the treatment received by other kindergarten students in the District and excluded from his kindergarten class because of his "handicap."

Defendants have not complied with the requirements of 45 C.F.R. section 88.4(b). In particular, Defendants have not complied with the requirement that "[a] recipient shall place a handicapped person in the regular educational environment created by the recipient unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily."

Based upon the foregoing, Plaintiffs are likely to succeed on the merits. Ryan Thomas has suffered irreparable injury because of his exclusion from class. There are serious questions presented by Plaintiff's Motion and the balance of hardships tips in Plaintiff's favor. Plaintiffs are entitled to the issuance of a preliminary injunction....

Plaintiffs are awarded...attorneys fees and...costs.

EAHCA DOES NOT REQUIRE A CHILD TO DEMONSTRATE BENEFITS OF AN EDUCATION, BUT THE LAW MANDATES EDUCATION FOR ALL HANDICAPPED CHILDREN.

Timothy W. V. Rochester, New Hampshire School District
875 F 2d 954 (1989)

United States Court of Appeals, First Circuit

BOWNES, Circuit Judge. Plaintiff-appellant Timothy W. appeals an order of the district court which held that under the Education for All Handicapped Children Act, a handicapped child is not eligible for special education if he cannot benefit from that education, and that Timothy W., a severely retarded and multiply handicapped child was not eligible under that standard. We reverse.

Timothy W. was born two months prematurely on December 8, 1975, with severe respiratory problems, and shortly thereafter experienced an intracranial hemorrhage, subdural effusions, seizures, hydrocephalus, and meningitis. As a result, Timothy is multiply handicapped and profoundly mentally retarded. He suffers from complex development disabilities, spastic quadriplegia, cerebral palsy, seizure disorder and cortical blindness. His mother attempted to obtain appropriate services for him and while he did receive some services from the Rochester Child Development Center, he did not receive any educational program from the Rochester School District when he became of school age.

On February 19, 1980, the Rochester School District convened a meeting to decide if Timothy was considered educationally handicapped under the state and federal statutes, thereby entitling him to special education and related services....In a meeting on March 7, 1980, the school district decided that Timothy was not educationally handicapped--that since his handicap was so severe he was not "capable of benefitting" from an education, and therefore was not entitled to one. During 1981 and 1982, the school district did not provide Timothy with any education program....

In response to a letter from Timothy's attorney, on January 17, 1984, the school district's placement team met....The placement team recommended that Timothy be placed at the Child Development Center so that he could be provided with a special education program. The Rochester School Board, however, refused to authorize the placement team's recommendation to provide education services for Timothy, contending that it still needed more information. The school district's request to have Timothy be given a neurological evaluation, including a CAT Scan, was refused by his mother....

On November 17, 1984, Timothy filed a complaint in the United States District Court,...alleging that his rights under the Education for All Handicapped Children Act..., the corresponding New Hampshire state law..., section 504 of the Rehabilitation Act of 1973..., and the equal protection and due process clauses of the United States and New Hampshire Constitutions, had been violated by the Rochester School District. The complaint sought preliminary and permanent injunctions directing the school district to provide him with special education....

A hearing was held in the district court on December 21, 1984....On January 3, 1985, the district court denied Timothy's motion for a preliminary injunction....

In September, 1986, Timothy again requested a special education program. In October, 1986, the school district continued to refuse to provide him with such a program, claiming it still needed more information. Various evaluations were done at the behest of the school district. On December 30, 1985, Dr. Cecila Pinto-Lord, a neurologist, had given Timothy a negative prognosis for learning, but did indicate he had some awareness of his environment; on October 10, 1986, Dr. Pinto-Lord stated that acquisition of new skills by Timothy was very unlikely....

On May 20, 1987, the district court found that Timothy had not exhausted his state administrative remedies before the New Hampshire Department of Education and precluded pretrial discovery until this had been done. On September 15, 1987, the hearing officer in the administrative hearings ruled that Timothy's capacity to benefit was not a legally permissible standard for determining his eligibility to receive a public education, and the Rochester School District must provide him with an education. The Rochester School District, on November 12, 1987, appealed this decision to the United States District Court by filing a counterclaim, and on March 29, 1988, moved for summary judgment. Timothy filed a cross motion for summary judgment.

Hearings were held on June 16 and 27, 1988..., relating "solely to the issue of whether or not Timothy W. qualifie[d] as an educationally handicapped individual." In addition to the large record containing the reports described above, additional testimony was obtained from various experts. Timothy's experts...testified that Timothy would benefit from a special education program including physical and occupational therapy, with emphasis on functional skills....The district court relied heavily on a...school district witness...who testified that Timothy probably does not have the capacity to learn education skills and activities....

The court...found that "Timothy W. is not capable of benefitting from special education....As a result, the defendant [school district] is not obligated to provide special education under either EAHCA...or...the New Hampshire statute...." Timothy W. has appealed this order....

...The language of the Act could not be more unequivocal. The statute is permeated with the words "all handicapped children" whenever it refers to the target population. It never speaks of any exceptions for severely handicapped children. Indeed,...the Act gives priority to the most severely handicapped. Nor is there any language whatsoever which requires as a prerequisite to being covered by the Act, that a handicapped child must demonstrate that he or she will benefit from the educational program. Rather, the Act speaks of the state's responsibility to design a special education and related services program that will meet the unique "needs" of all handicapped children. The language of the Act in its entirety makes clear that a "zero-reject" policy is at the core of the Act, and that no child, regardless of the severity of his or her handicap, is to ever again be subjected to the deplorable state of affairs which existed at the time of the Act's passage, in which millions of handicapped children received inadequate education or none at all. In summary, the Act mandates an appropriate public education for all handicapped children, regardless of the level of achievement that such children might attain....

We conclude that the Act's language dictates the holding that Timothy W. is a handicapped child who is in need of special education and related services because of his handicaps. He must, therefore, according to the Act, be provided with such an educational program. There is nothing in the Act's language which even remotely supports the district court's conclusion that "under [the Act], an initial determination as to a child's ability to benefit from special education, must be made in order for a handicapped child to qualify for education under the Act." The language of the Act is directly to the contrary: a school district has a duty to provide an educational program for every handicapped child in the district, regardless of the severity of the handicap.

An examination of the legislative history reveals that Congress intended the Act to provide a public education for all handicapped children, without exception....Moreover, the legislative history is unambiguous that the primary purpose of the Act was to remedy the then current state of affairs, and provide a public education for all handicapped children....Not only did Congress intend that all handicapped children be educated, it expressly indicated its intent that the most severely handicapped by given priority....In mandating a public education for all handicapped children, Congress explicitly faced the issue of the possibility of the non-educability of the most severely handicapped....

Thus, the district court's major holding, that proof of an educational benefit is a prerequisite before a handicapped child is entitled to a public education, is specifically belied, not only by the statutory language, but by the legislative history as well. We have not found in the Act's voluminous legislative history, nor has the school district directed our attention to, a single affirmative averment to support a benefit\eligibility requirement. But there is explicit evidence of a contrary congressional intent, that no guarantee of any particular educational outcome is required for a child to be eligible for public education....The Congressional intention is unequivocal: Public education is to be provided to all handicapped children, unconditionally and without exception....The District court's holding is directly contradicted by the Act's legislative history....

The judgment of the district court is reversed....

CONSENSUAL SEX BETWEEN A PRINCIPAL AND A TEACHER IS NOT SEXUAL HARASSMENT AND CANNOT SUPPORT A CHARGE OF SEXUAL DISCRIMINATION.

Trautvetter v. Quick
916 F 2d 1140 (1990)

United States Court of Appeals, Seventh Circuit

KANNE, Circuit Judge. Plaintiff-appellant, Patsy L. Trautvetter, brought an action in the district court in which she alleged that the defendants had engaged in sexual discrimination in violation of Title VII of the Civil Rights Act of 1964....

...[A]fter six years of full-time teaching and one year of maternity leave, she [Trautvetter] was assigned to teach first grade at Hymera Elementary after a second maternity leave to teacher second grade. She has since been teaching at Hymera Elementary continuously. Defendant, John Quick, began his term as the principal of Hymera Elementary in 1981 and, as such, was at all times relevant to these proceedings Trautvetter's immediate supervisor.

Beginning late in the 1985-86 school year and continuing into the 1986-187 school year, Quick made a number of romantic overtures towards Ms. Trautvetter. Initially, she put off these advances by either politely saying "no" or simply "laughing them off." Eventually, however, she began to respond to Quick's romantic suggestions. Indeed, the record reveals that Trautvetter became involved in a sexual relationship with Quick in which both parties participated actively....At no point...did she indicate to Mr. Quick that she thought his conduct was inappropriate....

Ms. Trautvetter recalled one instance in which Mr. Quick had called her....His first words (beyond "hello") were "Who do you love? Who do you love?" Trautvetter responded, "Yes, I love you." She testified that she felt she had to say it. The record reveals, however, that this was not the only time that Trautvetter told Quick that she loved him. She testified that Quick, on numerous other occasions, would state, "I love you. Do you love me?" Her response on these occasions was, "Yes, I love you."

On March 13, 1987, Ms. Trautvetter telephoned Mr. Quick and asked him "what was going on." Quick responded that he had feelings for her and suggested that they get together and talk about it. She agreed to join him and the two subsequently arranged to meet in the parking lot of a local business establishment during spring break. Although the meeting lasted about an hour, Trautvetter testified that no physical contact occurred. Mr. Quick did, however, tell Trautvetter that since they were in a motel parking lot he could get a room and they could "settle this now."

Trautvetter simply responded "no." Again, however, she did not tell Quick that she thought his conduct was inappropriate....

In April of 1987, the two agreed to meet on at least two occasions at an abandoned school building in Colemont, Indiana; an out-of-the-way place about which Quick had told her. According to Trautvetter, she and Quick would drive around the surrounding countryside, kissing and petting along the way. On one of these occasions, Quick asked Trautvetter if he could fondle her breasts. She let him do so. Again, at no time either prior to or during this encounter did Ms. Trautvetter tell Quick that she thought his conduct was inappropriate.

At some point in April, Ms. Trautvetter gave Quick a tape of a love song. She testified that she did so because Quick had earlier given a tape of a song to her. The record reveals, however, that Ms. Trautvetter also called a radio station and requested that "their song" be played over the air. She called Mr. Quick and told him to listen for it....

On May 8, 1987, Ms. Trautvetter and Mr. Quick drove in Ms. Trautvetter's car to a Regal 8 Motel where they had sexual intercourse. This rendezvous had been planned for a week. Trautvetter testified that she was nervous on this occasion. Trautvetter also testified that she felt no affection for Quick on this occasion, but engaged in intercourse with him only because she "felt she had to be there." The record reveals, however, that Trautvetter was not physically forced to show up at the motel, nor was she forced to engage in the sexual act. Moreover, the record reveals that shortly after that date, Trautvetter sent Quick a note which read, "I'll remember that night...and hope we will be friends forever."...

On June 9, 1987, the Trautvetters met with Richard Walters, the superintendent of the Northeast School Corporation....Mr. Walters asked them to "keep it quiet." At this point, however, it is undisputed that Mr. Walters was not aware of Ms. Trautvetter's allegations of sexual harassment; she had not told him. Indeed, Ms. Trautvetter testified that she had not even told her husband of her allegations of sexual harassment at this juncture....

On June 26, 1987, Ms. Trautvetter met with Mr. Walters and George Baker, a representative of the Indiana State Teacher's Association. During this meeting, Mr. Walters was informed for the first time of Trautvetter's allegations that Quick had pressured her into entering into the sexual relationship....

On July 14, 1987, Mr. Walters and the school corporation's legal counsel, Mr. Springer, met to begin the investigation into Ms. Trautvetter's allegations....All the persons interviewed (if they were aware of the relationship which existed between Trautvetter and Quick) indicated to Mr. Walters that they thought that relationship was consensual. Moreover, there was no indication from any of those persons that Quick had harassed Trautvetter sexually or otherwise....

Mr. Walters subsequently concluded his investigation. He found that the relationship which existed between Ms. Trautvetter and Mr. Quick was consensual in nature and, as such, that it did not result from any sexual harassment on the part of Mr. Quick....A letter was sent to both parties on July 22, 1987, informing them of that decision. That same letter advised both Ms. Trautvetter and Mr. Quick that a transfer would be considered by the board if either of them felt that their past relationship would interfere with their work relationship. Neither party made such a request for transfer. Although this letter did not constitute an official action of the board in that it had not been put to a "formal vote," it is undisputed that the board was presented with the letter and did not present any objections to its being mailed.

This appeal requires us to examine the often-blurred line which exists between human interaction in the workplace which is purely a private matter and human interaction in the workplace which gives rise to sexual harassment claims actionable under either Title VII or the equal protection clause of the fourteenth amendment....

...Ms. Trautvetter was neither affirmatively nor constructively discharged from her position at Hymera Elementary in relation to or as a result of these allegations. Indeed, at the time of oral argument, Ms. Trautvetter was still teaching at Hymera Elementary, having rejected an offer from the Northeast School Corporation to be transferred to a separate school. Ms. Trautvetter has also failed to allege (or demonstrate) that Mr. Quick's sexual advances infringed in some manner upon her ability to obtain a promotion or other job-related benefit. Thus, we are left with no prayer upon which the equitable relief provided for under Title VII may be granted. Accordingly, we affirm the district court's dismissal of Ms. Trautvetter's Title VII claims....Ms. Trautvetter argues that the defendants' actions, in both their individual and official capacities, violated her constitutional rights....

...Beyond the fact that Ms. Trautvetter initially declined Mr. Quick's offer for drinks, etc., the record is void of any evidence showing that she declared those advances to be unwelcome. Much to the contrary, the course of conduct when reviewed in its entirety, appears to substantiate the district court's findings that Ms. Trautvetter grew to "welcome" Mr. Quick's advances and even participated in an active way so as to encourage them....

Like any other equal protection claim, a claim of sexual harassment under the fourteenth amendment must show that the discrimination was intentional....

In light of this "intent" requirement, the issue which we are presented with in this context,...is whether Mr. Quick's sexual advances towards Ms. Trautvetter were "because of" her status as a woman or, in the alternative, whether those advances were inspired by characteristics, albeit some sexual, which were personal to Ms. Trautvetter....

...Thus, while it is clear that an individual plaintiff may pursue a sexual discrimination claim under the fourteenth amendment based solely upon acts of discrimination directed towards her, it is also clear that such a claim must show an intent to discriminate because of her status as a female and not because of characteristics of her gender which are personal to her. Without question, this line becomes indistinct when those factors which are personal to an individual include attributes of sexual attraction. In such a case, a careful analysis of the conduct which is alleged to be harassment is necessary to determine whether it is indeed "harassment" as that term is understood in the Title VII context--the first prong of our analysis. If this distinction--subtle as it is--is not maintained, any consensual workplace romance involving a state supervisor and employee which soured for one reason or another could give rise to equal protection claims if the employee simply alleges that his or her supervisor's conduct during the term of the romance constituted "sexual harassment." Such a scenario constitutes precisely the type of claim which the equal protection clause's "intent to discriminate" requirement was meant to discourage....

...[W]e conclude that she has not raised a genuine issue of material fact as to whether Mr. Quick's sexual advances were because of her status as a woman. Certainly, the underlying fact is that Ms. Trautvetter is a woman. But, as we have noted, her status as a woman does not itself support an allegation of sexual harassment under the equal protection clause; she must demonstrate in a colorable manner that Mr. Quick's advances were because of her status as a woman as opposed to characteristics, albeit some no doubt sexual, which were personal to her. This she has failed to do. Indeed, there is nothing in the record to indicate that Mr. Quick's feelings were based on anything but a personal attraction to Mr. Trautvetter. Ms. Trautvetter's own testimony leads us to this conclusion....

...Because there is nothing in this record to indicate that Mr. Quick's sexual advances were anything but personal in nature--that is, because there is no showing that Mr. Quick intended to "harass" Ms. Trautvetter...we affirm the decision of the district court.

A SCHOOL DRUG TESTING PROGRAM MAY REQUIRE A STUDENT ATHLETE TO TAKE A DRUG TEST AT THE BEGINNING OF THE SEASON AND SUBMIT TO RANDOM TESTING THEREAFTER.

Vernonia School Dist. 47J v. Acton
63 U.S.L.W. 4653, 115 S.Ct. ____ (1995)

Supreme Court of the United States

JUSTICE SCALIA delivered the opinion of the Court.

The Student Athlete Drug Policy adopted by School District 47J in the town of Vernonia, Oregon, authorizes random urinalysis drug testing of students who participate in the District's school athletics programs. We granted certiorari to decide whether this violates the Fourth and Fourteenth Amendments of the United States Constitution....

Drugs had not been a major problem in Vernonia schools. In the mid-to-late 1980's, however, teachers and administrators observed a sharp increase in drug use. Students began to speak out about their attraction to the drug culture, and to boast that there was nothing the school could do about it. Along with more drugs came more disciplinary problems. Between 1988 and 1989 the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980's, and several students were suspended. Students became increasingly rude during class; outbursts of profane language became common.

Not only were student athletes included among the drug users but, as the District Court found, athletes were the leaders of the drug culture....This caused the District's administrators particular concern, since drug use increases the risk of sports-related injury. Expert testimony at the trial confirmed the deleterious effects of drugs on motivation, memory, judgment, reaction, coordination, and performance. The high school football and wrestling coach witnessed a severe sternum injury suffered by a wrestler, and various omissions of safety procedures and misexecutions by football players, all attributable in his belief to the effects of drug use.

Initially, the District responded to the drug problem by offering special classes, speakers, and presentations designed to deter drug use....District officials began considering a drug-testing program. They held a parent "input night" to discuss the proposed Student Athlete Drug Policy (Policy), and the parents in attendance gave their unanimous approval. The school board approved the Policy for implementation in the fall of 1989. Its expressed purpose is to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs.

The Policy applies to all students participating in interscholastic athletics. Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents....

[Student athletes' urine] samples are sent to an independent laboratory, which routinely tests them for amphetamines, cocaine, and marijuana. Other drugs, such as LSD, may be screened at the request of the District, but the identity of a particular student does not determine which drugs will be tested. The laboratory's procedures are 99.94% accurate....Only the superintendent, principal, vice-principals, and athletic directors have access to test results, and the results are not kept for more than one year.

If a sample tests positive, a second test is administered as soon as possible to confirm the result. If the second test is negative, no further action is taken. If the second test is positive, the athlete's parents are notified, and the school principal convenes a meeting with the student and his parents, at which the student is given the option of (1) participating for six weeks in an assistance program that includes weekly urinalysis, or (2) suffering suspension from athletics for the remainder of the current season and the next athletic season. The student is then retested prior to the start of the next athletic season for which he or she is eligible. The Policy states that a second offense results in automatic imposition of option (2); a third offense is suspension for the remainder of the current season and the next two athletic seasons.

In the fall of 1991, respondent James Acton, then a seventh-grader, signed up to play football at one of the District's grade schools. He was denied participation, however, because he and his parents refused to sign the testing consent forms. The Actons filed suit, seeking declaratory and injunctive relief from enforcement of the Policy on the grounds that it violated the Fourth and Fourteenth Amendments of the United States Constitution....After a bench trial, the District Court entered an order denying the claims on the merits and dismissing the action....The United States Court of Appeals for the Ninth Circuit reversed, holding that the Policy violated both the Fourth and Fourteenth Amendments....

The Fourth Amendment to the United States Constitution provides that the Federal Government shall not violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,...." We have held that the Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers,...including public school officials, New Jersey v. T.L.O...

As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness." At least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted, whether a particular search meets the reasonableness standard "'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'"...Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant....[T]he warrant requirement [in schools] would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed," and "strict adherence to the requirement that searches be based upon probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools."...The school search we approved in *T.L.O.*, while not based on probable cause, *was* based on individualized *suspicion* of wrongdoing....

...Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.

Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination--including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians....

In *T.L.O.* we rejected the notion that public schools, like private schools, exercise only parental power over their students, which of course is not subject to constitutional constraints....Such a view of things, we said, "is not entirely 'consonant with compulsory education laws,'" *ibid*. quoting *Ingraham v. Wright*...."[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult."...[W]e have acknowledged that for many purposes "school authorities ac[t] *in loco parentis*," *Bethel*...with the power and indeed the duty to "inculcate the habits and manners of civility."...Thus, while children assuredly do not "shed their constitutional rights...at the schoolhouse gate," *Tinker*..., the nature of those rights is what is appropriate for children in school.... *Fraser*..."[I]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse"; *Hazelwood*...public school authorities may censor school-sponsored publications, so long as the censorship is "reasonably related to legitimate pedagogical concerns"; *Ingraham*,...[I]mposing additional administrative safeguards [upon corporal punishment]...would...entail a significant intrusion into an area of primary education responsibility."

Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children. For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases....

Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford....

There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. In Vernonia's public schools, they must submit to a preseason physical exam (James testified that his included the giving of a urine sample...). [S]tudents who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy....

Having considered the scope of the legitimate expectation of privacy at issue there, we turn next to the character of the intrusion that is complained of....Under the District's Policy, male students produce samples at a urinal along a wall. They remain fully clothed and are only observed from behind, if at all. Female students produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering. These conditions are nearly identical to those typically encountered in public restrooms, which men, woman, and especially school children use daily. Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible.

The other privacy-invading aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's body....[T]he drugs for which the samples are screened are standard, and do not vary according to the identity of the student. And finally, the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function....

The General Authorization Form that respondents refused to sign, which refusal was the basis for James's exclusion from the sports program, said only (in relevant part): "I...authorize the Vernonia School District to conduct a test on a urine specimen which I provide to test for drugs and/or alcohol use. I also authorize the release of information concerning the results of such a test to the Vernonia School District and to the parents and/or guardians of the student."...[W]e reach the...conclusion ...that the invasion of privacy was not significant....

That the nature of the concern is important--indeed, perhaps compelling--can hardly be doubted. Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs....School years are the time when the physical, psychological, and addictive effects of drugs are most severe. "Maturing nervous systems are more critically impaired by intoxicants than mature ones and childhood losses in learning are lifelong and profound"; "children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor."...And of course the effect of a drug-infested school are visited not just upon the user, but upon the entire student body and faculty, as the educational process is disrupted. In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction. Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes....

As for the immediacy of the District's concerns: We are not inclined to question--indeed, we could not possibly find clearly erroneous--the District Court's conclusion that "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion" that "[d]isciplinary actions had reached 'epidemic proportions,'" and that "the rebellion was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture." ...That is an immediate crisis of greater proportions than existed in Skinner, where we upheld the Government's drug testing program based on findings of drug use by railroad employees nationwide, without proof that a problem existed on the particular railroads whose employees were subject to the test....And of much greater proportions than existed in Von Raab, where there was no documented history of drug use by any customs officials....

As to the efficacy of this means for addressing the problem: it seems to us self-evident that a drug problem largely fueled by the "role model" effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs. Respondents argue that a "less intrusive means to the same end" was available, namely "drug testing on suspicion of drug use."...We have repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment....

Taking into account all the factors we have considered above--the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search--we conclude Vernonia's Policy is reasonable and hence constitutional.

We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian tutor of children entrusted to its care....

...We therefore vacate the judgment, and remand the case to the Court of Appeals for further proceedings consistent with this opinion.

THE SCHOOL BOARD MAY REMOVE WORKS OF ARISTOPHANES AND CHAUCER FROM THE SCHOOL CURRICULUM.

Virgil v. School Board of Columbia County, Florida
862 F 2d 1517 (1989)

United States Court of Appeals, Eleventh Circuit

ANDERSON, Circuit Judge. This case presents the question of whether the first amendment prevents a school board from removing a previously approved textbook from an elective high school class because of objections to the materials' vulgarity and sexual explicitness. We conclude that a school board may, without contravening constitutional limits, take such action where, as here, its methods are "reasonably related to legitimate pedagogical concerns." Accordingly, we affirm the judgment of the district court.

A LOCAL BOARD OF EDUCATION DOES NOT HAVE THE POWER TO REQUIRE STUDENTS OR PARENTS TO SIGN RELEASES FROM FUTURE LIABILITY CLAIMS FOR NEGLIGENCE AS A CONDITION FOR PARTICIPATION IN INTERSCHOLASTIC ATHLETICS.

Wagenblast v. Odessa School District No. 105-107-166J
758 P 2d 968 (1988)

Supreme Court of Washington

ANDERSON, Justice....

In these consolidated cases we consider an issue of first impression--the legality of public school districts requiring students and their parents to sign a release of all potential future claims as a condition to student participation in certain school-related activities.

The plaintiffs in these cases are public school children and their parents.

Odessa School District students Alexander and Charles Wagenblast and Ethan and Katie Herdrick all desired to participate in some form of interscholastic athletics. As a condition to such participation, the Odessa School District requires its students and their parents or guardians to sign a standardized form which releases the school district from "liability resulting from any ordinary negligence that may arise in connection with the school district's interscholastic activities programs." The releases are required by a group of small Eastern Washington School districts, including Odessa, which "pooled" together to purchase liability insurance.

The Seattle School District also requires students and their parents to sign standardized release forms as a condition to participation in interscholastic sports and cheerleading. When Richard and Paul Vulliet turned out for the Ballard High School wrestling team, they and their parents were required to sign release forms which released the Seattle School District, its employees and agents "from any liability resulting from any negligence that may arise in connection with the School District's wrestling program."...

One issue is determinative of these appeals....

Can school districts require public school students and their parents to sign written releases which release the districts from the consequences of all future school district negligence, before the students will be allowed to engage in certain recognized school related activities, here interscholastic athletics?...

We hold that the exculpatory releases from any future school district negligence are invalid because they violate public policy.....

The decision of the trial court in the Odessa School District case is affirmed and the decision of the trial court in the Seattle School District case is reversed.

A STATE-APPROVED PERIOD OF MEDITATION OR VOLUNTARY PRAYER IN THE PUBLIC SCHOOLS VIOLATES THE ESTABLISHMENT CLAUSE.

Wallace v. Jaffree
105 SCt 2479 (1985)

Supreme Court of the United States

Justice STEVENS delivered the opinion of the Court. At an early stage of this litigation, the constitutionality of three Alabama statues was questioned: (1) section 16-1-20, enacted, in 1978, which authorized a one-minute period of silence in all public schools "for meditation"; (2) section 16-1-20.1, enacted in 1981, which authorized a period of silence "for meditation or voluntary prayer"; and (3) section 16-1-20.2, enacted in 1982, which authorized teachers to lead "willing students" in a prescribed prayer to "Almighty God...the Creator and Supreme Judge of the world."

At the preliminary-injunction stage of this case, the District Court distinguished section 16-1-20 from the other two statutes. It then held that there was "nothing wrong" with section 16-1-20 but that section 16-1-20.1 and 16-1-20.2 were both invalid because the sole purpose of both was "an effort on the part of the State of Alabama to encourage a religious activity." After the trial on the merits, the District Court did not change its interpretation of these two statutes, but held that they were constitutional because, in its opinion, Alabama has the power to establish a state religion if it chooses to do so.

The Court of Appeals agreed with the District Court's initial interpretation of the purpose of both sections 16-1-20.1 and 16-1-20.2, and held them both unconstitutional. We have already affirmed the Court of Appeals' holding with respect to section 16-1-20.2. Moreover, appellees have not questioned the holding that section 16-1-20 is valid. Thus, the narrow question for decision is whether section 16-1-20.1, which authorizes a period of silence for "meditation or voluntary prayer," is a law respecting the establishment of religion within the meaning of the First Amendment....

On August 2, 1982, the District Court held an evidentiary hearing on appellees' motion for a preliminary injunction....A week after the hearing, the District Court entered a preliminary injunction....The court held that appellees were likely to prevail on the merits because the enactment of sections 16-1-20.1 and 16-1-20.2 did not reflect a clearly secular purpose.

In November 1982, the District Court held a four-day trial on the merits. The evidence related primarily to the 1981-1982 academic year--the year after the enactment of section 16-1-20.1 and prior to the enactment of section 16-1-20.2. The District Court found that during that academic year each of the minor plaintiffs' teachers had led classes in prayer activities, even after being informed of appellees' objections to these activities.

In its lengthy conclusions of law, the District Court reviewed a number of opinions of this Court interpreting the Establishment Clause of the First Amendment, and then embarked on a fresh examination of the question whether the First Amendment imposes any barrier to the establishment of an official religion by the State of Alabama. After reviewing at length what it perceived to be newly discovered historical evidence, the District Court concluded that "the establishment clause of the first amendment to the United States Constitution does prohibit the state from establishing a religion." In a separate opinion, the District Court dismissed appellees' challenge to the three Alabama statutes because of a failure to state any claim for which relief could be granted. The court's dismissal of this challenge was also based on its conclusion that the Establishment Clause did not bar the States from establishing a religion.

The Court of Appeals consolidated the two cases; not surprisingly, it reversed. The Court of Appeals noted that this Court had considered and had rejected the historical arguments that the District Court found persuasive, and that the District Court had misapplied the doctrine of state decisis. The Court of Appeals then held that the teachers' religious activities violated the Establishment Clause of the First Amendment. With respect of section 16-1-20.1 and section 16-1-20.2, the Court of Appeals stated that "both statutes advance and encourage religious activities." The Court of Appeals then quoted with approval the District Court's finding that section 16-1-20.1, and section 16-1-20.2 were efforts "to encourage a religious activity. Even though these statutes are permissive in form, it is nevertheless state involvement respecting an establishment of religion." Thus, the Court of Appeals concluded that both statutes were specifically the type which the Supreme Court addressed in Engel....

Our unanimous affirmance of the Court of Appeals' judgment concerning section 16-1-20.2 makes it unnecessary to comment at length on the District Court's remarkable conclusion that the Federal Constitution imposes no obstacle to Alabama's establishment of a state religion. Before analyzing the precise issue that is presented to us, it is nevertheless appropriate to recall how firmly embedded in our constitutional jurisprudence is the proposition that the several States have no great power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States.

As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the individual's freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience. Until the Fourteenth Amendment was added to the Constitution, the First Amendment's restraits on the exercise of federal power simply did not apply to the States. But when the Constitution was amended to prohibit any State from depriving any person of liberty without due process of law, that Amendment imposed the same substantive limitations on the States' power to legislate that the First Amendment had always imposed on the Congress' power. This Court has confirmed and endorsed this elementary proposition of law time and time again....

Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Mohammedism or Judaism. But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects--or even intolerance among "religions"--to encompass intolerance of the disbeliever and the uncertain. As Justice Jackson eloquently stated in Board of Education v. Barnett,...:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

The State of Alabama, no less than the Congress of the United State, must respect that basic truth.

When the Court has been called upon to construe the breadth of the Establishment Clause, it has examined the criteria developed over a period of many years. Thus, in Lemon v. Kurtzman,...we wrote:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by

> the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative propose, second, its principal or primary effect must be one that neither advances nor inhibits religions,...finally, the statute must not foster 'excessive government entanglement with religion'....

It is the first of these three criteria that is most plainly implicated by this case. As the District Court correctly recognized, no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose. For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion,...that First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion.

In applying the purpose test, it is appropriate to ask "whether government's actual purpose is to endorse or disapprove of religion." In this case, the answer to that question is dispositive. For the record not only provides us with an unambiguous affirmative answer, but it also reveals that the enactment of section 16-1-20.1 was not motivated by any clearly secular purpose--indeed, the statute had no secular purpose.

The sponsor of the bill that became section 16-1-20.1, Senator Donald Holmes, inserted into the legislative record--apparently without dissent--a statement indicating that the legislation was an "effort to return voluntary prayer" to the public schools. Later Senator Holmes confirmed this purpose before the District Court. In response to the question whether he had any purpose for the legislation other than returning voluntary prayer to public schools, he stated, "No, I did not have no other purpose in mind." The State did not present evidence of any secular purpose....

The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school days. The 1978 statute already protected that right, containing nothing that prevented any student from engaging in voluntary prayer during a silent minute of meditation. Appellants have not identified any secular purpose that was not fully served by section 16-1-20 before the enactment of section 16-1-20.1. Thus, only two conclusions are consistent with the text of section 16-1-20.2: (1)the statute was enacted to convey a message of State endorsement and promotion of prayer; or (2) the statute was enacted for no purpose. No one suggests that the statute was nothing but a meaningless or irrational act....

The Legislature enacted section 16-1-20.1 despite the existence of section 16-1-20 for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day. The addition of "or voluntary prayer" indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the Government must pursue a course of complete neutrality toward religion.

The importance of that principle does not permit us to treat this as an inconsequential case involving nothing more than a few works of symbolic speech on behalf of the political majority. For whenever the State itself speaks on a religious subject, one of the questions that we must ask is "whether the Government intends to convey a message of endorsement or disapproval of religion." The well-supported concurrent findings of the District Court and the Court of Appeals--that section 16-1-20.1 was intended to convey a message of State-approval of prayer activities in the public schools--make it unnecessary, and indeed inappropriate, to evaluate the practical significance of the addition of the words "or voluntary prayer" to the statute. Keeping in mind, as we must, "both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded," we conclude that section 16-1-20.1 violates the First Amendment.

The judgment of the Court of Appeals is affirmed....

SEARCH OF A STUDENT'S CAR AND LOCKED BRIEFCASE IS CONSTITUTIONAL.

State of Washington v. Slattery
787 P 2d 932 (1990)

Court of Appeals of Washington

COLEMAN, Chief Judge. On February 26, 1987, a student contacted Vice Principal Sterling Thurston in his office at Thomas Jefferson High School. The student told Thurston that Mike Slattery was selling marijuana in the parking lot. Thurston believed the information to be reliable...and...called Slattery into his office and asked him to empty his pockets. Slattery was carrying $230 cash in small bills and a piece of paper with a telephone pager number on it. Thurston recently had learned that pagers are often used by drug dealers. Thurston then called security. A security officer searched Slattery's locker, but found nothing. When Thurston told Slattery that they would have to search his car, Slattery refused. One of the security officers told Slattery that they would get into his car one way or another. After speaking to his mother on the telephone, Slattery gave the officials his keys.

The officials found a pager and a notebook inside the car. The notebook had names with dollar amounts written next to the names. The officials then opened the locked trunk of the car. Inside they found a locked briefcase. Slattery first said that he did not know who owned the briefcase, then said a friend owned it and that he did not know the combination. The security officers then pried open the briefcase and discovered what turned out to be 80.2 grams of marijuana. The police were called and Slattery was arrested....

The Fourth Amendment to the United States Constitution and the Washington Constitution, Article 1, section 7, protects persons from unreasonable searches and seizures. Government agents, therefore, must have a search warrant unless some other condition justifies a warrantless search....Some of the conditions have been used to justify exceptions to the warrant requirement are (1) searches incident to arrest,...(2) exigent circumstances,...(3)searches of students conducted by school authorities, New Jersey v. T.L.O....The school search exception applies in this case.

Under the school search exception, school officials may search students if, under all the circumstances, the search is reasonable....Whether a search is reasonable depends upon the satisfaction of two criteria. First, the action must have been justified at its inception....Second, the search conducted must have been reasonably related in scope to the circumstances that justified the interference in the first place....The rationale for the school search exception is that school teachers and administrators have a substantial interest "in maintaining discipline in the classroom and on school grounds," which weighs against a child's interest in privacy.

Appellant concedes that it may have been reasonable to search him and his locker, but argues that it was unreasonable to extend the search to his car and the locked briefcase in the car. The school search exception is a limited one, appellant argues, and applies only to unintrusive searches, such as of a school locker....

...The vice principal was told that appellant, who was nearly 18 years old, was selling marijuana in the parking lot. The vice principal had reason to believe the information, based upon his past experience with the informant and reports the vice principal had received earlier from others that appellant was involved with drugs. Appellant was carrying a large amount of money in small bills and a pager number that reasonably could lead the principal to expect to find drugs in appellant's possession. Drug use was a serious, ongoing problem at the school. School officials were confronted with exigent circumstances that warranted an immediate search because Slattery or a friend could have removed his car from the school grounds.

When the school officials did not find any drugs on Slattery or in his locker, they locally went outside to search his car, which was parked in the school parking lot where the informant had said Slattery had been selling marijuana. The officials found a notebook with names and dollar amounts next to the names and a telephone pager--then the officials found a locked briefcase. The school officials' initial search of Slattery's person was justified at its inception. They had reasonable grounds for suspecting that the search of Slattery would turn up evidence that he had violated the law. The searches of Slattery's locker, car, and briefcase were reasonably related in scope to the circumstances which justified the interference in the first place. To limit the school search exception to a search of a student's body or his locker would be anomalous in light of the rationales of T.L.O.

UNDER THE EQUAL ACCESS ACT, WHEN A SCHOOL CREATES AN OPEN FORUM BY HAVING NON-CURRICULAR RELATED CLUBS IN SCHOOL, IT MAY NOT DENY A STUDENT REQUEST TO FORM A CLUB BASED ON THE RELIGIOUS CONTENT OF CLUB MEETINGS.

Board of Education of the Westside Community Schools v. Mergens
110 SCt 2356 (1990)

Supreme Court of the United States

JUSTICE O'CONNOR delivered the opinion of the Court....

This case requires us to decide whether the Equal Access act, 98 Stat. 1302, U.S.C. Sections 4071-4074, prohibits Westside High School from denying a student religious group permission to meet on school premises during noninstructional time, and if so, whether the Act, so construed, violates the Establishment Clause of the First Amendment....

Students at Westside High School are permitted to join various student groups and clubs, all of which meet after school hours on school premises. The students may choose from approximately 30 recognized groups on a voluntary basis....

There is no written school board policy concerning the formation of student clubs. Rather, students wishing to form a club present their request to a school official who determines whether the proposed club's goals and objectives are consistent with school board policies and with the school district's "Mission and Goals"--a broadly worded "blueprint" that expresses the district's commitment to teaching academic, physical, civic, and personal skills and values.

In January 1985, respondent Bridget Mergens met with Westside's principal, Dr. Findley, and requested permission to form a Christian club at the school. The proposed club would have the same privileges and meet on the same terms and conditions as other Westside student groups, except that the proposed club would not have a faculty sponsor. According to the students' testimony at trial, the club's purpose would have been, among other things, to permit the students to read and discuss the Bible, to have fellowship, and to pray together. Membership would have been voluntary and open to all students regardless of religious affiliation.

Findley denied the request, as did associate superintendent Tangdell. In February 1985, Findley and Tangdell informed Mergens that they had discussed the matter with superintendent Hanson and that he had agreed that her request should be denied. The school officials explained that school policy required all student clubs to have a faculty sponsor, which the proposed religious club would not or could not have, and that a religious club at the school would violated the Establishment Clause. In March 1985, Mergens appealed the denial of her request to the Board of Education, but the Board voted to uphold the denial....

In Widmar v. Vincent, we invalidated, on free speech grounds, a state university regulation that prohibited student use of school facilities "for purposes of religious worship or religious teaching." In doing so, we held that an "equal access" policy would not violate the Establishment Clause under our decision in Lemon v. Kurtzman....In particular, we held that such a policy would have a secular purpose, would not have the primary effect of advancing religion, and would not result in excessive entanglement between government and religion....We noted, however, that "[u]niversity students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."

In 1984, Congress extended the reasoning of Widmar to public secondary schools. Under the Equal Access Act, a public secondary school with a "limited open forum" is prohibited from discriminating against students who wish to conduct a meeting within that forum on the basis of the "religious, political, philosophical, or other content of the speech at such meetings."...Specifically, the Act provides:

> It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings."...

A "limited open forum" exists whenever a public secondary school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." "Meeting" is defined to include "those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum." "Noninstructional time" is defined to mean "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." Thus, even if a public secondary school allows only one "noncurriculum related student group" to meet, the Act's obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time.

The Act further specifies that "[s]chools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum: if the school uniformly provides that the meetings are voluntary and student-initiated; are not sponsored by the school, the government, or its agents or employees; do not materially and substantially interfere with the orderly conduct of educational activities within the school; and are not directed, controlled, conducted, or regularly attended by "nonschool persons."..."Sponsorship" is defined to mean "the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting." If the meetings are religious, employees or agents of the school or government may attend only in a "nonparticipatory capacity." Moreover, a State may not influence the form of any religious activity, require any person to participate in such activity, or compel any school agent or employee to attend a meeting if the content of the speech at the meeting is contrary to that person's beliefs....

Finally, the Act does not "authorize the United States to deny or withhold Federal financial assistance to any school,"...or "limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at the meetings is voluntary,"....

The parties agree that Westside High School receive federal financial assistance and is a public secondary school within the Act. The Act's obligation to grant equal access to student groups is therefore triggered if Westside maintains a "limited open forum"--i.e., if it permits one or more "noncurriculum related student groups" to meet on campus before or after classes.

Unfortunately, the Act does not define the crucial phrase "noncurriculum related student group." Our immediate task is therefore one of statutory interpretation. We begin, of course, with the language of the statute....The common meaning of the term "curriculum" is "the whole body of courses offered by an educational institution or one of its branches." Webster Third New International Dictionary 557 (1976); see also Black's Law Dictionary 3456 (5th ed. 1979) ("The set of studies of courses for a particular period, designated by a school or branch of a school")...Any sensible interpretation of "noncurriculum related student group" must therefore be anchored in the notion that such student groups are those that are not related to the body of courses offered by the school. The difficult question is the degree of "unrelatedness to the curriculum" required for a group to be considered "noncurriculum related."

The Act's definition of the sort of "meeting[s]" that must be accommodated under the statute,...sheds some light on this question. "[T]he term 'meeting' includes those activities of student groups which are...not directly related to the school curriculum."...Congress' use of the phrase "directly related" implies that student groups directly related to the subject matter of courses offered by the school do not fall within the "noncurriculum related" category and would therefore be considered "curriculum related."

The logic of the Act also supports this view, namely, that a curriculum-related student group is one that has more than just a tangential or attenuated relationship to courses offered by the school. Because the purpose of granting equal access is to prohibit discrimination between religious or political clubs on the one hand and other noncurriculum-related student groups on the other, the Act is premised on the notion that a religious or political club is itself likely to be a noncurriculum-related student group. It follows, then, that a student group that is "curriculum related" must at least have a more direct relationship to the curriculum than a religious or political club would have.

Although the phrase "noncurriculum related student group" nevertheless remains sufficiently ambiguous that we might normally resort to legislative history,...we find the legislative history on this issue less than helpful....

...[W]e think that the term "noncurriculum related student group" is best interpreted broadly to mean any student group that does not directly relate to the body of courses offered by the school. In our view, a student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit. We think this limited definition of groups that directly relate to the curriculum is a commonsense interpretation of the Act that is consistent with Congress' intent to provide a low threshold for triggering the Act's requirements.

For example, a French club would directly relate to the curriculum if a school taught French in a regularly offered course or planned to teach the subject in the near future. A school's student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school. If participation in a school's band or orchestra were required for the band or orchestra classes, or resulted in academic credit, then those groups would also directly relate to the curriculum. The existence of such groups at a school would not trigger the Act's obligations.

On the other hand, unless a school could show that groups such as a chess club, a stamp-collecting club, or a community service club fall within our description of groups that directly relate to the curriculum, such groups would be "noncurriculum related student groups" for purposes of the Act. The existence of such groups would create a limited open forum under the Act and would prohibit the school from denying equal access to any other student group on the basis of the content of that group's speech. Whether a specific student group is a "noncurriculum related student group" will therefore depend on a particular school's curriculum, but such determinations would be subject to factual findings well within the competence of trial courts to make.

Petitioners contend that our reading of the Act unduly hinders local control over schools and school activities, but we think that schools and school districts nevertheless retain a significant measure of authority over the type of officially recognized activities in which their students participate.... First, schools and school districts maintain their traditional latitude to determine appropriate subjects of instruction. To the extent that a school chooses to structure its course offerings and existing student groups to avoid the Act's obligations, that result is not prohibited by the Act....Second, the Act expressly does not limit a school's authority to prohibit meetings that would "materially and substantially interfere with the orderly conduct of educational activities within the school."...The act also preserves "the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary."...Finally, because the Act applies only to public secondary schools that receive federal financial assistance,...a school district seeking to escape the state's obligations could simply forgo federal funding. Although we do not doubt that in some cases this may be an unrealistic option, Congress clearly sought to prohibit schools from discriminating on the basis of the content of a student group's speech, and that obligation is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups....

The parties in this case focus their dispute on 10 of Westside's approximately 30 voluntary student clubs: Interact (a service club related to Rotary International); Chess; Subsurfers (a club for students interested in scuba diving); National Honor Society; Photography; Welcome to Westside (a club to introduce new students to the school); Future Business Leaders of America; Zonta (the female counterpart of Interact); Student Advisory Board (student government); and Student Forum (student government....Petitioners contend that all of these student activities are curriculum-related because they further the goals of particular aspects of the school's curriculum....

To the extent that petitioners contend that "curriculum related" means anything remotely related to abstract educational goals, however, we reject that argument. To define "curriculum related" in a way that results in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing students groups, would render the Act merely hortatory....

Rather, we think it clear that Westside's existing student groups include one or more "noncurriculum related student groups." Although Westside's physical education classes apparently include swimming,...counsel stated at oral argument that scuba diving is not taught in any regularly offered course at the school,...Based on Westside's own description of the group, Subsurfers does not directly relate to the curriculum as a whole in the same way that a student government or similar group might....Moreover, participation in Subsurfers is not required by any course at the school and does not result in extra academic credit. Thus Subsurfers is a "noncurriculum related student group" for purposes of the Act. Similarly, although math teachers at Westside have encouraged their students to play chess, chess is not taught in any regularly offered course at the school,...and participation in the chess club is not required for any class and does not result in extra credit for any class,....The chess club is therefore another "noncurriculum related student group" at Westside. Moreover, Westside's principal acknowledged at trial that the Peer Advocates program--a service group that works with special education classes--does not directly relate to any courses offered by the school....Peer Advocates would therefore also fit within our description of a "noncurriculum related student group." The record therefore supports a finding that Westside has maintained a limited open forum under the Act....

The remaining statutory question is whether petitioners' denial of respondents' request to form a religious group constitutes a denial of "equal access" to the school's limited open forum. Although the school apparently permits respondents to meet informally after school,...respondents seek equal access in the form of official recognition by the school. Official recognition allows student clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, the public address system, and annual Club Fair. Given that the Act explicitly prohibits denial of "equal access...to...any students who wish to conduct a meeting within [the school's] limited open forum" on the basis of the religious content of the speech at such meetings,...we hold that Westside's denial of respondents' request to form a Christian club denies them "equal access" under the Act.

Because we rest our conclusion on statutory grounds, we need not decide--and therefore express no opinion on--whether the First Amendment requires the same result.

Petitioners contend that even if Westside has created a limited open forum within the meaning of the Act, its denial of official recognition to the proposed Christian club must nevertheless stand because the Act violates the Establishment Clause of the First Amendment, as applied to the States through the Fourteenth Amendment. Specifically, petitioners maintain that because the school's recognized student activities are an integral part of its educational mission, official recognition of respondents' proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students.

We disagree....

...The judgment of the Court of Appeals is affirmed....

WHEN A SCHOOL DISTRICT POLICE OFFICER'S "PAT-DOWN" OF A STUDENT WHO WAS REPORTED CARRYING A WEAPON IN SCHOOL IS JUSTIFIED AT ITS INCEPTION AND REASONABLE IN ITS SCOPE, IT DOES NOT VIOLATE A STUDENT'S RIGHTS.

Wilcher v. State of Texas
876 SW 2d 466 (1994)

Court of Appeals of Texas, El Paso

BARAJAS, Chief Justice.

This is an appeal from a conviction for the offense of possession of marijuana in an amount under two ounces. The appellant pled guilty and the court assessed punishment at 60 days' confinement in the county jail. In the Appellant's sole point of error, he asserts that the trial court erred in overruling his motion to suppress the contraband. We affirm the judgment of the trial court....

During the suppression hearing, the State utilized the testimony of Ann George, a police officer for the Houston Independent School District. She was assigned to Madison Senior High School; her duties entailed quelling disturbances and generally carrying out the various school policies applicable to her job assignment.

On May 20, 1983, a school administrator told Officer George to bring the Appellant to his office because of a report that the Appellant was carrying a .25 automatic pistol. She could not locate the appellant that day but she did encounter him the next day at about 8:00 a.m. Officer George told him to go to the school administrator's office. She learned that he did not go to the office. She saw him on the physical education field at approximately 9:30 a.m. and took him to the school administrator's office. Officer George related that the Appellant was supposed to be in class at the time. He was seventeen years old at the time these events took place.

Upon arrival at the administrator's office, he closed the door and Officer George asked the Appellant to empty his pockets. The Appellant produced a pager, a cigarette lighter, $1,131 in currency and two small bags of marijuana. Officer George called the Houston Police Department and Officer Robert Willis arrived. Willis search the Appellant and found a sandwich bag full of marijuana.

Officer George testified that she had two reasons for taking the appellant to the school administrator's office. He was brought to the office in response to the report given the preceding day that the Appellant was carrying a pistol. Secondly, it appeared that the appellant was skipping class. Regarding the first reason, Officer George stated that while she never "patted-down" the Appellant and did not observe anything indicating the Appellant was armed, she believed the Appellant might be armed based upon the report she received....

While carrying out searches and other disciplinary functions pursuant to school policies, school officials act as representatives of the State and the strictures of the Fourth Amendment apply to their actions. [I]n T.L.O....the Supreme Court reasoned:

> [T]he accommodation of the privacy interests of school children with the substantial need of teachers and administrators for freedom to maintain order in the school does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search....

The courts utilize a two-prong test to determine the reasonableness of a search:

> First, a court must determine whether the search was justified at its inception....Second, a court must determine whether the search, as actually conducted, was reasonably related in scope to the circumstances which justified the interference in the first place....

The Appellant cites the Coronado case in support of his contention that the scope of search was overly intrusive in light of the nature of the infraction. In Coronado, an assistant principal, Kim Benning, received information that the defendant attempted to sell drugs to another student. After questioning, the assistant principal patted down the defendant and had him turn his pants pockets inside-out, remove his shoes, and pull down his pants. The search produced no contraband although the defendant had $300.00 cash in his possession. When queried whether he sold drugs on campus, the defendant responded, "Not on campus."...

Eight days later the school secretary informed the assistant principal that the defendant was leaving school at 9:30 to attend his grandfather's funeral. The assistant principal suspected the defendant's motives in leaving school and when he saw him at the outside pay phone, he asked him to come into the school. A phone call to the defendant's relatives revealed that his grandfather was not deceased. The defendant was evasive about whether he drove a car to school and the make of the car. The assistant principal stated he was investigating a possible truancy. He patted down the defendant and caused him to remove his shoes and socks. The defendant was told to pull down his pants. No contraband was found. Benning and a sheriff's deputy assigned to the school then searched the defendant's locker but, again, no contraband was discovered. The assistant principal, the sheriff's deputy and a school security guard then located the defendant's car. The defendant was told to open the car and a white powder, a triple beam balance and marijuana was found in the trunk. Coronado v. State....

The Court of Criminal Appeals held:

> We believe the first prong of T.L.O. is met. Benning had reasonable grounds to suspect that appellant was violating school rules by "skipping." Therefore, Benning had reasonable grounds to investigate why appellant was attempting to leave school and was justified in "patting down" appellant for safety reasons. However, the subsequent searches violated the second prong of T.L.O. The searches were not reasonably related in scope to the circumstances which initially justified Benning's interference with appellant, i.e., Benning's suspicion of appellant's skipping school. Nor were the searches reasonably related to any discovery from the initial "pat down." Rather, the post "patdown" searches of appellant's clothing and person, locker, and vehicle were excessively intrusive in light of the infraction of attempting to skip school. Additionally, nothing observed during the patdown or subsequent search of appellant's search and person, or locker, would justify Benning's expansion of the search to appellant's vehicle. Coronado v. State...

In the present case, the Appellant contends the Coronado case stands for the proposition that Officer George only had grounds to investigate the Appellant for being out of class and was entitled to only conduct a pat down search at the physical education field, which she did not do. The Appellant asserts that placing him in a custodial situation and ordering him to empty his pockets exceeded the scope authorized in Coronado, for a mere pat down for officer safety.

We do not read the Coronado case to stand for the proposition that a school official investigating alleged illegal conduct or infractions of school policy is invariably limited to a pat down search for his or her safety. Here, Officer George initially acted upon a report that the Appellant was carrying a weapon. This was the primary motivation why she detained the Appellant. The truancy aspect of her investigation developed as a result of her attempts to get the Appellant to report to the school administrator. Here, unlike the situation in Coronado, the Appellant's act in emptying his pockets was reasonably related in scope to the circumstances which justified the initial interference; that is, the report of possessing a weapon. Once the contraband was discovered, no further searching resulted and the police were summoned. While it may have been more efficacious from a law enforcement standpoint to initially pat down the Appellant, we find that the search was reasonable from its inception and the search was reasonably related in scope to the circumstances which justified the interference in the first instance. Accordingly, Appellant's sole point of error is overruled.

Having overruled Appellant's sole point of error, the judgment of the trial court is affirmed.

AFFIRMATIVE RETENTION POLICY LAYING OFF SENIOR NONMINORITY TEACHERS AND RETAINING LESS SENIOR AFRICAN-AMERICAN TEACHERS VIOLATES EQUAL PROTECTION.

Wygant v. Jackson Board of Education
106 SCt 1842 (1986)

Supreme Court of the United States

Justice POWELL announced the judgment of the Court and delivered an opinion in which THE CHIEF JUSTICE and Justice REHNQUIST joined, and which Justice O'CONNOR joined in parts I, II, II-A, III-B, and V. [There was no single opinion supported by a majority of the justices.]

This case presents the question whether a school board, consistent with the Equal Protection Clause, may extend preferential protection against layoffs to some of its employees because of their race or national origin.

In 1972 the Jackson Board of Education because of racial tension in the community that extended to its schools, considered adding a layoff provision to the Collective Bargaining Agreement (CBA) between the Board and the Jackson Education Association (the Union) that would protect employees who were members of certain minority groups against layoffs. The board and the Union eventually approved a new provision, Article XII of the CBA, covering layoffs. It stated:

> In the event that it becomes necessary to reduce the number of teachers through layoff from employment by the board, teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff....

When layoffs became necessary in 1974, it was evident that adherence to the CBA would result in the layoff of tenured nonminority teachers while minority teachers on probationary status were retained. Rather than complying with Article XII, the Board retained the tenured teachers and laid off probationary minority teachers, thus failing to maintain the percentage of minority personnel that existed at the time of the layoff. The Union, together with two minority teachers who had been laid off, brought suit in federal court,...claiming that the Board's failure to adhere to the layoff provision violated the Equal Protection Clause of the Fourteenth Amendment and Title VII of the Civil Rights Act of 1964....

Petitioners' central claim is that they were laid off because of their race in violation of the Equal Protection Clause of the Fourteenth Amendment. Decisions by faculties and administrators of public schools based on race or ethnic origin are reviewable under the Fourteenth Amendment. This Court has "consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'"..."Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination." Regents of University of California v. Bakke.....

The Court has recognized that the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination....In this case, Article XII of the CBA operates against whites and in favor of certain minorities, and therefore constitutes a classification based on race. "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees." Fullilove v. Klutznick....There are two prongs to this examination. First, any racial classification "must be justified by a compelling governmental interest."...Second, the means chosen by the State to effectuate its purpose must be "narrowly tailored to the achievement of that goal."...We must decide whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored.

The Court of Appeals, relying on the reasoning and language of the District Court's opinion, held that the Board's interest in providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination, was sufficiently important to justify the racial classification embodied in the layoff provision....The court discerned a need for more minority faculty role models by finding that the percentage of minority teachers was less than the percentage of minority students.

This Court never has held that societal discrimination alone is sufficient to justify a racial classification. Rather, the Court has insisted upon some showing of prior discrimination by the government unit involved before allowing limited use of racial classification in order to remedy such discrimination....

...The role model theory allows the Board to engage in discriminatory hiring and layoff practices long past the point required by any legitimate remedial purpose. Indeed, by tying the required percentage of minority teachers to the percentage of minority students, it requires just the sort of year-to-year calibration the Court stated was unnecessary in Swann....

Moreover, because the role model theory does not necessarily bear a relationship to the harm caused by prior discriminatory hiring practices, it actually could be used to escape the obligation to remedy such practices by justifying the small percentage of black teachers by reference to the small percentage of black students....Carried to its logical extreme, the idea that black students are better off with black teachers could lead to the very system the Court rejected in *Brown v. Board of Education*....

Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. The role model theory announced by the District Court and the resultant holding typify this indefiniteness....No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies that work against innocent people, societal discrimination is in sufficient and over expansive. In the absence of particularized findings, a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future.

Respondents also now argue that their purpose in adopting the layoff provision was to remedy prior discrimination against minorities by the Jackson School District in hiring teachers. Public schools, like other public employers, operate under two interrelated constitutional duties. They are under a clear command from this Court, starting with *Brown v. Board of Education*..., to eliminate every vestige of racial segregation and discrimination in the schools. Pursuant to that goal, race-conscious remedial action may be necessary....On the other hand, public employers, including public schools, also must act in accordance with a "core purpose of the Fourteenth Amendment" which is to "do away with all governmentally imposed distinctions based on race."...These related constitutional duties are not always harmonious; reconciling them requires public employers to act with extraordinary care. In particular, a public employer like the Board must ensure that, before it embarks on an affirmative action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination.

Evidentiary support for the conclusion that remedial action is warranted becomes crucial when the remedial program is challenged in court by nonminority employees....The ultimate burden remains with the employees to demonstrate the unconstitutionality of an affirmative action program. But unless such a determination is made, an appellate court reviewing a challenge to remedial action by nonminority employees cannot determine whether the race-based action is justified as a remedy for prior discrimination.

...Here...the means chosen to achieve the Board's asserted purposes is that of laying off nonminority teachers with greater seniority in order to retain minority teachers with less seniority.

We have previously expressed concern over the burden that a preferential layoffs scheme imposes on innocent parties....Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job....

We therefore hold that, as a means of accomplishing purposes that otherwise may be legitimate, the Board's layoff plan is not sufficiently narrowly tailored. Other, less intrusive means of accomplishing similar purposes--such as the adoption of hiring goals--are available. For these reasons, the Board's selection of layoffs as the means to accomplish even a valid purpose cannot satisfy the demands of the Equal Protection Clause.

We accordingly reverse....

WHEN A MALE TEACHER HUGS AND KISSES THE NECK OF A DISTRESSED MALE STUDENT, IT MAY BE POOR JUDGMENT, BUT IT IS NOT IMMORAL CONDUCT, WORTHY OF THE TEACHER'S DISMISSAL.

Youngman v. Doerhoff
890 SW 2d 330 (1994)

Missouri Court of Appeals, Eastern District

CRAHAN, Judge.

Ronald V. Youngman ("Teacher") appeals his dismissal as a permanent teacher by the Board of Education Gasconade County R-1 School District ("Board") based on its determination that he had engaged in "immoral conduct."...

The incidents which gave rise to the charge are two encounters between Teacher and a student, C.C., both of which occurred at school and during school hours. [While discussing the primary incident with the superintendent, Teacher reported he had hugged C.C. at least on one other occasion about two weeks prior to the incident.] Both Teacher and C.C. testified at the hearing and their versions of both incidents were consistent in all material respects....

C.C.'s student file reflects a history of physical abuse by his father and periods of foster case....Teacher has taught language arts for more than twenty years and had been at the Herman Middle School teaching seventh and eighth grade students for nearly fifteen years. Colleagues testified that he was one of the most popular teachers at the middle school....C.C. was a student in Teacher's language arts class....

At about noon on March 16, 1993, C.C. was walking down a hall hear the cafeteria as Teacher emerged from the cafeteria. C.C. had been to the office because he wasn't feeling well. Teacher asked C.C. what was wrong and he replied that he "wasn't feeling good." According to C.C., Teacher said "Me either" and then said "Well, [C.C.], give me a hug." Teacher then hugged C.C. and rubbed his lower back. According to C.C., he just stood there and did not respond to Teacher's hug. As Teacher hugged him, Teacher kissed him twice on the neck. Then Teacher said, "It's okay, [C.C.], because we're going to get through this together." Teacher then left and C.C. went to lunch....

C.C. testified that he was "shocked" and that Teacher's behavior made him "very uncomfortable" because "nobody that's even close to me like relatives or anything would kiss me on the neck." C.C. felt as if Teacher was "making a pass."...

Teacher testified that he hugged and kissed C.C. on March 16 in an effort to comfort him. According to Teacher, C.C. was teary-eyed and in obvious distress. Teacher had no indication that C.C. was offended by his actions. Had he been informed of C.C.'s reaction to the prior incident, he would have refrained from hugging him.

Teacher testified that he had never received any directions not to hug students at the middle school level. In fact, the principal, Mr. Combs, had told the teachers that he would rather have the middle school more like the elementary school when it came to responding to children....Teacher had never been advised of any district policy with regard to physical contact with students or that anyone felt his conduct was inappropriate. Teacher indicated his willingness to abide by district policy should he be informed of it....

The Board made no findings whatsoever as to Teacher's intent or motive for the conduct charged. Rather, the findings are fully consistent with Mr. Doerhoff's [superintendent] position that Teacher's conduct was "inappropriate" because it "could be misinterpreted." Based on our review of the Board's findings and the evidentiary record, we conclude that the Board's omission of any finding that Teacher engaged in the subject conduct for the purpose of sexual gratification or other improper motive was intentional. Had the Board concluded that Teacher was motivated by an sexual intent, there would have been no reason to make any findings as to whether the conduct was offensive to or solicited by C.C. If the Board believed that Teacher hugged and hissed C.C. for the purpose of sexual gratification, it would be irrelevant whether C.C. invited or enjoyed it. Sexual advances toward a child constitute immoral conduct by a Teacher regardless of the child's reaction or invitation. Thus, the fact that the Board focused exclusively on the offensiveness of the conduct to C.C. strongly corroborates our conclusion that the Board accepted Teacher's explanation that his actions were motivated by a sense of caring and concern for C.C. and were an attempt to comfort him....

...Immoral conduct is conduct which is always wrong. Just as one can never be accidentally or unwittingly dishonest, immoral conduct requires at least an inference of conscious intent. To hold otherwise would vitiate the legislature's intent to provide stability and certainty in matters of teacher discipline and seriously undermine if not destroy the concept of prior notice that due process requires in teacher termination cases....

It follows that the Board's determination that Teacher engaged in "immoral conduct' cannot properly be predicated solely on C.C.'s reactions to Teacher's conduct. Experience suggests that individual reactions to the most well-intended displays of affection or comfort vary widely from person to person....C.C.'s testimony confirms that there was a valid basis for Teacher's concern. Although C.C. denied that he was crying, he stated that the incident began when Teacher asked him what was wrong, thus indirectly confirming that his distress was manifest. In response to Teacher's inquiry, C.C. confirmed that he was not feeling well, which would naturally cause any Teacher to express feelings of caring and concern. What followed was a clash of two opposite cultures. C.C. comes from a background in which "nobody that's even close to me like relatives or anything would kiss me on the neck." Teacher comes from a background in which such gestures are routine. In hindsight, Teacher may certainly be faulted for his failure to appreciate that these sort of cultural differences exist and that his physical demonstrativeness might be offensive to those with different backgrounds or even misperceived as a sexual advance. On this record, it appears that Teacher's actions were misconstrued by C.C.; they clearly were offensive to him. Yet these subjective reactions, even if they are the product of poor judgment on Teacher's part, cannot transform well-intended conduct into a immoral act.

We find also no evidentiary support for the Board's determination that Teacher's action did not "conform to the standards of the community." All of the evidence was to the contrary. Neither the principal or the superintendent were willing to testify that hugging or even kissing a child of middle school age would be immoral in all circumstances. Several teachers testified that physical contact with students had been expressly encouraged. The superintendent testified that he had never issued any policy on the matter aside from his specific instructions to Teacher upon the afternoon of March 18, two days after the incident occurred....

For the reasons set forth above, we hold that the evidence in this case does not support a finding that Teacher engaged in "immoral conduct." Although Teacher may have exhibited poor judgment in failing to anticipate that his actions might be offensive to or misinterpreted by C.C., such a lapse in judgment does not constitute "immoral conduct." Teacher testified to his willingness to conform his behavior to whatever policy school officials may adopt. Should he fail to do so, he will clearly be subject to further disciplinary action.

The judgment of the circuit court is reversed....